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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 178

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER, ET AL.,
ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 26, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 10,221

IN EQUITY.

GREAT NORTHERN RAILWAY COMPANY, APPELLANT,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

FILED JANUARY 10, 1935.

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1 Great Northern Railway Company, Plaintiff,

vs.

J. J. Weeks, State Tax Commissioner, J. M. Baillie as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor and W. D. Conway as Treasurer of Benson County; Ole Colbornson as Auditor and Sam H. Wilson as Treasurer of Bottineau County; H. F. Magedanz as Auditor and Jerry Donovan as Treasurer of Burke County; F. Ford Doherty as Auditor and C. A. Baumgartner as Treasurer of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor and H. J. Oberman as Treasurer of Dickey County; R. H. Lynch as Auditor and O. A. Steffler as Treasurer of Divide County; S. W. Lyman as Auditor and Hugh Peoples as Treasurer of Eddy County; J. B. McWethy as Auditor and M. P. Roberts as Treasurer of Foster County; Martin O. Haugen as Auditor and John Sandbek as Treasurer of Grand Forks County; P. A. Melgard as Auditor and R. J. Howden as Treasurer of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor and Oluf Erickson as Treasurer of McKenzie County; F. J. Haines as Auditor and Nels Hofland as Treasurer of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor and J. H. Hannesson as Treasurer of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor and W. C. Budke as Treasurer of Renville County; George J. Fischer as Auditor and Karl L. Mikkelson as Treasurer of Richland County; Jas. H. Penny as Auditor and Allister McKay as Treasurer of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. H. Mustad as Au-

ditor and Florence Carlson as Treasurer of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortensen as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota, Defendants.

2 Pleas before the Honorable Andrew Miller, Judge of the United States District Court for the District of North Dakota, at the December, 1933, term of said Court:

Be It Remembered that on the 15th day of February, 1934, a bill of complaint was filed in this cause, which bill of complaint is in words and figures following, to-wit:

3 Bill of Complaint.

To the Honorable Judge of the District Court of the United States for the District of North Dakota:

Plaintiff complains of the above named defendants and alleges that:

I.

Plaintiff is a corporation organized under the laws of the State of Minnesota and now operates and for many years past has operated a railroad extending from St. Paul and Duluth, Minnesota, and Superior, Wisconsin, through the States of Minnesota, North Dakota, South Dakota, Iowa, Montana, Idaho, Washington and Oregon and into the State of California and the Dominion of Canada and lines running into or through thirty counties in North Dakota. Its head office and principal place of business is at St. Paul, Minnesota. It is and has been engaged mainly in foreign commerce and commerce among the states as a common carrier of freight and passengers by said railroad and to a lesser extent in the transportation wholly within each of the states above named including the State of North Dakota. Its lines of railroad within North Dakota extend into the counties of Barnes, Benson, Bottineau, Burke, Cass, Cavalier, Dickey, Divide, Eddy, Foster, Grand Forks, Griggs, McHenry, McKenzie, Mountrail, Nelson, Pembina, Pierce, Ramsey, Renville, Richland, Rolette, Sargent, Steele, Towner, Traill, Walsh, Ward, Wells, and Williams.

4 II.

Defendants are citizens and residents of the State of North Dakota and hold the offices severally designated in the caption hereof. The county officers named in said caption are charged with the duty of enforcing taxes in their respective counties, based upon assessment made by the State Board of Equalization in North Dakota against plaintiff's property. Defendant J. J. Weeks as State Tax Commissioner is charged with the duty of enforcing collection of said taxes in the event of failure of said county officers to collect the same.

III.

This suit arises under the Constitution and Laws of the United States and involves, exclusive of interest and costs, a sum or value in excess of $600,000; and involves a sum or value in excess of $3,000.00 with respect to each of the counties above named into which plaintiff's lines of railroad extend. It is brought to enjoin the collection of taxes for the year 1933 assessed against the railroad properties of the plaintiff, which taxes the plaintiff claims have been levied and assessed contrary to the Constitution and Laws of the State of North Dakota; and also in violation of the Constitution of the United States in that the said assessment and levy take property without due process of law and impose an arbitrary and unreasonable burden upon commerce among the states and foreign nations.

5 IV.

The Constitution and Statutes of North Dakota in effect now and at all times herein mentioned, contained the following provisions:

Section 176 of the Constitution, as amended by Articles 20 and 29 of Amendments thereto:

"Taxes shall be uniform upon the same class of property including franchises within the territorial limits of the authority levying the tax * * *."

Section 179 of the Constitution, as amended by Articles 20 and 44 of Amendments:

"* * * The property, including franchises of all railroads operated in this state * * * used directly or indirectly in the carrying of persons, property or messages, shall be assessed by the State Board of Equalization in a manner prescribed by such state board or commission as may be provided by law."

Section 2122, Supplement to the 1913 Compiled Laws, 1913-1925:

"All property subject to taxation, shall be assessed at its true and full value in money."

Section 2141 of Supplement to the 1913 Compiled Laws of North Dakota, 1913-1925:

"The governor, state treasurer, state auditor, commissioner of agriculture and labor and the state tax commissioner shall constitute the state board of equalization."

Section 2242, Compiled Laws of 1913:

"The State Board of Equalization shall at its annual meeting in August in each year, assess at its actual value the franchise, roadway, roadbed, rails and rolling
6 stock of all railroads operated in this state. * * * To enable said Board to make a correct valuation of such property, they shall have access to all reports, estimates and surveys of such lines of railroads as may be on file in the office of the Commissioners of Railroads and shall have power to summon and compel the attendance of witnesses, and may examine such witnesses under oath in any matter relating to the value of such property. In estimating the value of such railroads, branches and sidetracks thereof they shall be governed by the same rules as are provided for the government of county and township assessors in valuing other property in this state. * * *"

Section 2243, Compiled Laws of North Dakota 1913:

"The board of equalization shall divide the valuation so found and determined of each continuous line by the number of miles of such line contained in the state, and the result shall be the valuation per mile for which said line shall be assessed. The value of each branch line shall be determined in the same manner, and such valuation per mile shall be apportioned to each county according to the number of miles of such line or branch line contained in such county."

Section 2244, Compiled Laws of North Dakota 1913:

"The state auditor shall at the time of certifying the equalized value of each organized county to the county auditor, also certify the number of miles of each main line of railroad, and branches and sidetracks thereof contained in said county and the valuation per mile of such line or branch line as determined by the state board of equalization and the county auditor of such county shall apportion such valua-

tion to the cities, towns, townships and districts
7 through which such railroads run according to the number of miles contained in each, as a part of the valuation of such city, town, township and district for the purpose of taxation, and the same shall be taxed as personal property is taxed in each county."

Initiated Measure, approved June 9, 1932 (Laws of North Dakota 1933, p. 493), provides that all property, real, personal and mixed, subject to a general property tax, shall be valued and assessed at fifty per cent of its full and true value, and provides further that assessors shall assess and return all taxable property at its full and true value and makes it the duty of the county auditor of each county, after equalization by the State Board of Equalization, to make the computations necessary to reduce such assessed value to said fifty per cent.

V.

Under the statutes, it is the duty of the State Board of Equalization to equalize the assessment of all property in the several counties assessed by the local authorities so that all taxable property in the state, whether assessed by the State Board of Equalization or by local authorities, shall be assessed uniformly according to its true and full value in money. After equalization of the assessment upon all of the taxable property in the state, it is the duty of said State Board of Equalization to certify to each county auditor the equalized value placed upon all taxable property within each county.

8

VI.

In compliance with statutory requirements plaintiff has for many years, including 1933, furnished to the State Tax Commissioner data relating to its assets and liabilities, value of property, earnings, operating and other expenses, and taxes paid, and such other information as said Tax Commissioner has required for the purpose of determining what its annual assessment should lawfully be.

VII.

For the year 1933, the State Board of Equalization made a purported assessment for plaintiff's railway property fixing the value thereof within the State of North Dakota at $78,832,888, whereas the actual true and full value in money of plaintiff's property was at the date of said assessment not more than $45,000,000. The said assessment was certified out to the several county auditors above named in the amounts

shown in column 1 of the following table. Each county auditor then determined a "taxable value" for all property in his county, including railroad property, at 50% of its full assessed value, as required by law, and levied a tax against said "taxable value" of plaintiff's property in his county in the amounts shown in column 2 of the following table:

9

County	#1 Full Assessed Valuation	#2 Amount of Tax
Barnes	$ 468,980	$ 7,374.99
Benson	2,574,340	46,952.38
Bottineau	3,380,454	64,754.57
Burke	2,202,746	49,232.69
Cass	7,267,462	119,169.21
Cavalier	2,717,244	52,766.38
Dickey	1,331,054	18,562.18
Divide	595,142	15,895.42
Eddy	1,174,822	19,402.39
Foster	954,604	17,558.54
Grand Forks	5,835,018	96,748.24
Griggs	1,277,488	19,794.24
McHenry	5,341,896	96,880.90
McKenzie	1,207,052	34,947.64
Mountrail	3,577,890	86,958.10
Nelson	2,796,942	56,977.22
Pembina	2,427,188	44,155.49
Pierce	2,844,164	49,662.10
Ramsey	3,842,468	69,629.17
Renville	909,540	21,658.34
Richland	2,548,746	41,434.53
Rolette	1,449,688	29,087.64
Sargent	1,572,494	28,170.26
Steele	1,348,932	28,353.90
Towner	1,125,532	16,831.84
Traill	3,513,838	53,620.38
Walsh	2,303,334	45,517.70
Ward	4,433,170	95,895.92
Wells	1,233,688	18,532.24
Williams	6,546,972	161,827.74
Total	$78,832,888	$1,508,352.34

10 By reason of the over-assessment hereinafter described, 43% of each of said tax levies is excessive and unlawful, and the maximum tax which could lawfully have been levied upon plaintiff's property in each of said counties does not exceed 57% of the said respective tax levies.

VIII.

Plaintiff's property in North Dakota has no going concern or earnings value whatever except for operation in

connection with the balance of plaintiff's railroad system, 92% of the traffic handled over it is interstate traffic and only 8% is traffic moving wholly within the state of North Dakota. If operated independently and without connection with the balance of said system, the said property in North Dakota would be unable to earn its expenses of operation and would have no money value whatever except such amount as could be obtained by salvaging and selling its materials and right of way and such value would not exceed ten or fifteen per cent of the amount assessed. Its only value in excess of said salvage value is and has been its going concern or revenue producing value derived from its operation as a part of plaintiff's railroad system.

The value of plaintiff's property in North Dakota can only be determined either by first determining the value of its entire system and then allocating a proper proportion thereof to the property in North Dakota, or else by determining the net earnings from all traffic moving over said lines in North Dakota and capitalizing such net earnings. Such net earnings can only be determined by adding to the revenues from intrastate traffic moving over said
11 lines, a proper proportion of the revenues from interstate traffic moving partly over said lines and deducting the cost of moving such traffic.

IX.

The assessments of plaintiff's property in North Dakota for 1933 and for many years immediately preceding were the result in effect of assessing in North Dakota properties and values actually located in other states, and of over valuing plaintiff's railroad system. For the year 1932 and many preceding years, the assessing authorities of North Dakota determined a value for plaintiff's railroad system by capitalizing its average yearly net earnings or income for various past periods at various rates of percentage and by averaging the value thus obtained with the average value of plaintiff's stocks and bonds as determined by their average selling price for various preceding periods, certain amounts being deducted from said stock and bond value as representing the value of property and securities owned by plaintiff but not constituting a part of its railway system. Said assessing authorities then allocated to North Dakota as the value of plaintiff's property in North Dakota a portion of said system value equal to the average proportion which certain figures for North Dakota bore to the corresponding figures for plaintiff's entire railroad system. The figures used in determining said proportions were the following:

(1) Miles of all track.

(2) Amount of physical property as measured by cost of reproduction less depreciation.

(3) Cars and locomotives moved one mile.

12 (4) Tons of freight and passengers moved one mile.

(5) Gross earnings, the gross earnings in North Dakota being computed by adding to the revenues in North Dakota from intrastate traffic a proportion of the revenue from all interstate traffic passing into or through North Dakota equal to the proportion which the miles of track in North Dakota used for moving such traffic bore to the total miles of track used for moving such traffic.

X.

In the year 1932, the State Tax Commissioner submitted a report to the Board of Equalization computing value for plaintiff's property in North Dakota by the method above outlined at $76,115,715; he also made an allocation of the same system value to North Dakota by a so-called "alternative method", using for the purpose of allocation, only the factors numbered 3, 4 and 5 in the above list, and thereby computed a value for plaintiff's property in North Dakota of $79,417,825. The Board thereupon assessed plaintiff's property in North Dakota at $78,850,024 for 1932. Similar computations made for 1933 would have produced values of $62,949,425 and $65,695,310 respectively, but said Board of Equalization, as plaintiff is informed and believes, made no computation of the value of plaintiff's property in North Dakota for 1933 but instead adopted the 1932 assessment as and for its 1933 assessment and made no deduction or decrease whatever except $17,136 which was due to the removal of a small amount of plaintiff's trackage in North Dakota. The assessment
13 per mile remained the same as for 1932 and the total assessment for 1933 was $78,832,888.

XI.

Plaintiff alleges that the values of its railroad system as computed by the assessing authorities of North Dakota as aforesaid were excessive because the amounts deducted from stock and bond values as the value of plaintiff's properties and securities not forming a part of its railroad system were inadequate and less than the full values of such properties and securities, and because plaintiff's net earnings were capitalized at an inadequate rate per cent; and in the years 1931, 1932 and 1933 said system values as so computed were par-

ticularly excessive because undue weight was given to earnings and stock and bond values during the years 1928 and 1929. Abnormally active business conditions in 1928 and 1929 had produced high earnings and high stock and bond values in those years. Said business and economic conditions had disappeared in the later years and plaintiff's current and prospective earning power and stock and bond values had greatly decreased so that the weight given to figures as of 1928 and 1929 by said assessing authorities was excessive. This is particularly true in the case of stock and bond values. The current prices of stocks and bonds reflect the judgment of investors as to the weight to be given to all past as well as current earnings, and current prices reflect past as well as present experience. To average current stock and bond prices and the prices for past periods gave double weight to past conditions and unduly increased the amounts computed as the plaintiff's system values.

14 XII.

At all of the times herein mentioned, the use of the factors numbered 1, 3, 4 and 5 in the list set forth in paragraph IX hereof, or any of them, in allocating the value of plaintiff's system to North Dakota have resulted in assessing and taxing in North Dakota property owned by plaintiff and located in other states and in an unlawfully and unreasonably high allocation of plaintiff's system value to North Dakota and in a gross over-valuation and over-assessment of plaintiff's property in North Dakota.

North Dakota is a comparatively level prairie state of relatively cheap railroad construction and without expensive terminals whereas the balance of plaintiff's system includes all of its larger and more expensive terminals and lies largely in mountain topography requiring extensive cuts and embankments, tunnels, bridges, snow-sheds and other relatively expensive construction. Branch lines constitute 61% of plaintiff's mileage in North Dakota and only 45% on the balance of its system. The average mile of line in the plaintiff's system outside of North Dakota contained approximately 66 2/3% more physical property and would be approximately 66 2/3% more expensive to build than the average mile of plaintiff's line in North Dakota. The average mile of plaintiff's line in North Dakota includes less grading and embankment, less bridges, tunnels and snow protection, less terminal property and 40% less total physical property than the average mile on the balance of the plaintiff's system. The average cost of reproduction less depreciation per mile of plain-

tiff's railroad line in North Dakota as determined by
15 the Interstate Commerce Commission, plus the cost of additions and improvements to December 31, 1932, was only 54.83% as great as that for the balance of the system outside of North Dakota.

XIII.

The average mile of plaintiff's road in North Dakota is also less valuable from the standpoint of traffic density and earnings, and traffic production than the average mile on the balance of plaintiff's system. The ton miles of freight carried per mile of road operated for North Dakota and for the balance of plaintiff's system for the years 1930, 1931 and 1932 were as follows:

	State of North Dakota	Balance of System
1930	827,509	1,111,017
1931	609,544	777,063
1932	474,715	528,297

The tons of freight originating per mile of road operated for plaintiff's lines in North Dakota and for the balance of its system for the years 1930, 1931 and 1932 were as follows:

	State of North Dakota	Balance of System
1930	1,204	3,689
1931	835	2,117
1932	645	990

XIV.

The use of the proportion of miles of road or track as an allocation factor for North Dakota is an exceedingly inaccurate and excessive measure of physical property in
16 the case of the plaintiff's railroad system for the reason that some miles contain many times as much physical property as others and in general, miles of plaintiff's road outside of North Dakota contain much more physical property than the average mile of road in the state.

The use of the proportion of tons of freight or passengers moved one mile or of cars or locomotives moved one mile as an allocation factor for North Dakota is exceedingly inaccurate and excessive as a measure of earnings or of service performed, because such a movement on the average in North Dakota involves the use of less property and indicates less service and less earnings than a similar movement over an average mile of plaintiff's track outside of North Dakota.

Rates for the movement of through traffic are in general established on a basis sufficient to pay the total operating expenses of the movement plus a return on the investment in the property required to make the movement. Where the movement in a particular state, because of mountain location or extensive terminals, requires more than average operating expenses and more than average investment, some addition must be made to the through rate in order to cover such excess. A mileage prorate of the through charge, therefore, credited to North Dakota, which is a state of cheaper than average construction and operation, a portion of the revenues collected for service actually performed in states of more expensive construction and operation.

17

XV.

The value of plaintiff's railroad system had greatly decreased between the date of assessment in 1932 and the corresponding date in 1933. The net earnings of plaintiff's railroad system for the year 1931, the last calendar year preceding the 1932 assessment were $12,669,420, while for 1932, the last calendar year preceding the 1933 assessment, they had decreased to $1,290,551. The average annual net earnings of the system for the three calendar years and for the five calendar years, respectively, preceding each date of assessment were as follows:

	3 Year Period	5 Year Period
Preceding the 1932 assessment	$22,346,483	$25,507,212
Preceding the 1933 assessment	$11,957,493	$19,924,814

The total value of plaintiff's stocks and bonds as represented by their average selling price was $461,845,051.00 for the calendar year preceding the 1932 assessment, $296,301,177 for the calendar year preceding the 1933 assessment, and $229,[illegible]35,500 as of the date of assessment, all without any deductions for the value of properties and securities not forming a part of plaintiff's railroad system.

A computation of the value of plaintiff's property in North Dakota for 1933 by the methods used in 1932 and previous years as above described would have produced an assessment of plaintiff's property in North Dakota approximately fifteen million dollars less than the said assessment

18 actually made by the State Board of Equalization. In making its said assessment for 1933, the said State Board of Equalization not only failed to correct the said excessive factors of allocation but in effect applied them to a

system value as of the preceding year and failed to make any reduction whatever because of the reduction in the value of plaintiff's railroad system.

XVI.

The cost of reproduction less depreciation of plaintiff's system as of December 31, 1932, was $564,608,688. Plaintiff has always been and will continue to be entirely unable to earn any fair rate of return on said sum and will be unable to earn a fair rate of return on any sum in excess of $332,080,233. Plaintiff's actual system value in money is not more than said last named sum and is, therefor, not more than 58.82% of its cost of reproduction less depreciation. The full assessed value of plaintiff's property for 1933 in all of the other states in which any part of its line is located and which make ad valorem assessments is 52.32% of the cost of reproduction less depreciation of the property in those states while the assessment in North Dakota herein complained of is 100.82% of the cost of reproduction less depreciation of the said property in North Dakota.

XVII.

Plaintiff's system value as of the 1933 assessment date was at least $74,752,867 less than as of the 1932 assessment date, so that the use of the 1932 system value in 1933 would produce an excess of $74,752,867 in the system value for 1933.

19 Approximately 18.86% of this excess in system value was allocated to North Dakota in the 1933 assessment and resulted in an over-valuation in North Dakota of $14,098,390. The proportion of plaintiff's system value actually located in North Dakota was not more than 13½%, whereas, due to the use of said exaggerated and erroneous factors of allocation, approximately 18.86% or an excess of 5.36% was allocated to North Dakota for 1933. This produced an additional over-assessment of $18,397,433, making a total over-assessment of more than $32,000,000. This over-assessment resulted in a levy of more than $600,000 of taxes in excess of the amounts which could lawfully have been levied.

XVIII.

At all of the times herein mentioned and particularly at the time of making the said assessment for 1933 herein complained of, the said Board of Equalization was fully advised of and entirely familiar with all of the facts above allleged; and notwithstanding this it had deliberately, intentionally and continuously ignored all of said facts and deliberately,

knowingly, intentionally and continuously over-valued and over-assessed plaintiff's property by many millions of dollars and allocated a grossly excessive proportion thereof to the state of North Dakota and assessed plaintiff's property in North Dakota on account of values of property located in other states in the amount of many millions of dollars, all with the deliberate purpose and intent of defrauding plaintiff and requiring it to pay taxes not lawfully due in the amount of several hundred thousand dollars per year. In making its assessment of plaintiff's property for 1933, the said Board of Equalization acted without any logical
20 process of reasoning or basis of fact and adopted a valuation for plaintiff's property in North Dakota grossly in excess of any valuation or assessment which could be determined by any known, recognized, accepted, usual or reasonable method and made its assessment arbitrarily and without reference to or consideration of the actual value in money of plaintiff's property in North Dakota.

XIX.

All other property subject to assessment and taxation in North Dakota is required to be assessed at its true and full value in money and plaintiff alleges upon information and belief that at all times herein mentioned, all such other property was so assessed. The assessment actually made of plaintiff's property as aforesaid imposed upon it an unwarranted share of the tax burden of the state and materially discriminated against plaintiff as compared with other taxpayers and owners of other property.

The collection of said taxes would deprive plaintiff of property without due process of law and of the equal protection of the law, contrary to the provisions of the 14th Amendment to the Constitution of the United States and would improperly burden interstate commerce and obstruct plaintiff in the transportation of persons and property in interstate commerce in derogation of the power of Congress to regulate interstate commerce under the Constitution of the United States and in violation of the provisions of said Constitution.

21 XX.

The exaggeration and distortion in the allocation factors mentioned in paragraph IX hereof, as applied to plaintiff's railroad system can be removed and corrected only by some method which will give proper weight to the proportion of physical property, traffic and earnings in the state. This can be done by adding to the total revenues in North

Dakota from intrastate traffic, a proportion of earnings from interstate traffic moving into or through North Dakota equal to the proportion of property used in carrying such traffic and the cost of performing the service and then determining the net earnings for North Dakota by deducting from the gross revenues so determined the operating expenses incurred in moving the traffic. The proportion of net earnings in North Dakota to system net earnings will determine the proportion of plaintiff's system value in North Dakota, or a capitalization of the net earnings in North Dakota thus determined would determine the value of plaintiff's property in North Dakota.

XXI.

For the five calendar years preceding the date of the 1933 assessment the net earnings of plaintiff's railroad system had been as follows:

1928	$31,294,069
1929	$32,457,523
1930	$21,912,508
1931	$12,669,420
1932	$ 1,290,551
Average for the last 3 years	$11,957,493
Five year average	$19,924,814

22 Plaintiff believes and alleges that the prospective earning power of plaintiff's railway system at the date of assessment did not exceed the sum of $12,000,000 per year which sum was far in excess of its then current earning power, and that a capitalization of said 5-year average earnings of $19,924,814, would greatly exceed its full system value.

The value of plaintiff's system as of the date of assessment can be determined by capitalizing said prospective earning power at that percentage rate which capital was then earning or might reasonably expect to earn in business undertakings of similar nature and security or risk, and which would be just sufficient to attract capital for similar investment, which rate plaintiff believes and alleges was not less than 7% per annum. Capitalizing plaintiff's said 5-year average earnings (which exceeded plaintiff's prospective earning power) at said rate would produce a system value on said date of assessment of $284,640,200, and capitalizing at the rate of 6%, which was generally used by the taxing authorities of North Dakota in previous years, and which plain-

tiff believes to be unduly low, would produce a system value on said date of assessment of not more than $332,080,233.

XXII.

The ownership of the plaintiff corporation at all times herein mentioned was divided into approximately 2,500,000 shares of capital stock and plaintiff's railroad system was subject to prior mortgage liens securing bonds of a face value of $353,143,515. Said stocks and bonds were
23 listed and extensively bought and sold on the New York Stock Exchange. At the date of assessment, plaintiff owned in addition to its railway system, other properties and securities not forming a part of its railway system or contributing to the earnings or value thereof. On the date of assessment, said other properties and securities had a value of not less than $176,147,986. Their value as computed by the State Tax Commissioner of North Dakota, in his 1932 report to the Board of Equalization was $165,-458,268.

The total value of plaintiff's stocks and bonds on the date of assessment was $229,485,500 as evidenced by the latest market sales thereof, $296,301,177 as evidenced by the average market price for a period of one year next preceding said date of assessment, and $379,073,114 as evidenced by average market prices for the last two years.

Deducting $165,458,268, the computation by the State Tax Commissioner as the value of plaintiff's said other property and securities, the total value of plaintiff's railway system alone on the date of assessment as indicated by the said market price of its stock and bonds was not more than $213,-614,846 according to the highest of the figures above quoted. Plaintiff believes and alleges that the full and true value in money of plaintiff's entire railroad system on date of assessment determined on the highest reasonable basis that could be used was much less than $332,080,233.

XXIII.

The average yearly net earnings from plaintiff's property in North Dakota determined in the manner set forth in paragraph XX above for the five calendar years
24 preceding the date of assessment in 1933 were not more than 13.5% of the total net earnings of plaintiff's railroad system. An allocation of a system value of $332,080,233 to North Dakota on said percentage produces a value for plaintiff's property in North Dakota on said assessment date of $44,830,831. Plaintiff believes and alleges

that the true and full value in money of its property in North Dakota on the date of assessment did not exceed $45,000,000.

XXIV.

Section 2156 of the Compiled Laws of North Dakota, 1913, provides that the county treasurer shall be the receiver and collector of all taxes extended upon the tax lists of the county levied for state, city, town, school, poor, bridge, road, or other purposes. Section 2244, Compiled Laws of North Dakota, 1913, provides that railroad property shall be taxed as personal property is taxed in each county. Section 2166, Compiled Laws of North Dakota, 1913, as amended by Chapter 241, Laws of 1929, provides that all personal property taxes shall become due on the 31st day of December in each and every year for which the tax was levied and if not paid become delinquent on the 1st day of March next after they become due and thereupon a penalty of 5% shall attach and be charged upon all delinquent taxes, and thenceforth there shall be charged interest at the rate of three-fourths of one per cent per month on the original amount of the tax until same is paid. The taxes assessed and levied against the plaintiff's property, described in this bill, are a lien against its property, prior and paramount to all other liens and a cloud upon its title. Under the law it is the duty of the defendant county treasurers to collect the taxes referred to, and if not paid on or before the fifteenth day of September, 1934, to certify the same to the sheriffs of the respective counties for collection by distraint and sale, and unless restrained by this Court, such proceedings will be taken. If the respective defendant county treasurers are permitted to proceed with the collection of said taxes and to certify the collection thereof to the sheriffs of the respective counties, such action will result in many vexatious proceedings resulting in great expense, loss, and embarrassment to the plaintiff and will impede the management and operation of plaintiff's business. Plaintiff has no adequate or complete remedy at law and it cannot obtain relief except in equity. Should plaintiff pay to the said several counties the taxes so levied, the plaintiff would have no remedy for the recovery thereof except by action against each of said counties and its officers. Such a procedure would involve the plaintiff and said several counties in a multiplicity of suits; and there would be involved in each of said suits the issue as to the percentage of the true and full value of plaintiff's property and other property at which the said Board of Equalization had assessed said property and other property in said state; and in order to avoid said multiplicity of suits

and a multiplicity of determinations of the issue as above stated, it is necessary that plaintiff secure relief in equity, and to that end plaintiff files this bill.

26 XXV.

Notwithstanding plaintiff's contention that not more than 57% of the amount of taxes levied in the respective counties as set forth in paragraph VII hereof are lawfully levied, plaintiff is willing and ready and hereby offers either to pay into the court for the benefit of said counties or to pay direct to the counties, 60% of the amount of taxes levied in the respective counties as aforesaid; and on or before March 1, 1934, plaintiff will tender each of said counties 60% of the taxes levied in such county.

Wherefore, and inasmuch as plaintiff is remediless by the strict rules of common law, and is only relievable in equity, plaintiff files this, its bill of complaint against said defendants, and prays:

That said defendants may be required to make full and true answer to this bill of complaint (but not under oath, answer under oath being expressly waived);

That 43% of the taxes so assessed and levied against plaintiff should be adjudged and decreed to be unequal, discriminatory, illegal and void and that the same be cancelled upon the records of said counties.

That the said defendants, their officers, agents, attorneys and any and all others acting or to act under, for or through them or by their direction, or in their behalf, may be perpetually enjoined and restrained from the collection of, or any attempt to collect, any of the said taxes levied against plaintiff by the taxing authorities of the state of North Dakota, because of such assessment of plaintiff's property by the State Board of Equalization in excess of 57% of the amounts levied; and that a temporary restraining
27 order be issued against the defendant county treasurers during the pendency of this action restraining them, and each of them, from proceeding to collect the said taxes in excess of said 57% or such other percentage as this court may determine;

That plaintiff may have such other and further relief as the nature of the case shall require, and to Your Honor shall seem meet, and may it please Your Honor to grant also to

plaintiff a writ of subpoena to be directed to said defendants, and each of them, commanding them, and each of them, to appear and make answer to plaintiff's bill of complaint at a certain time, and to abide the further order of the Court.

C. J. MURPHY,
T. A. TONER,
Grand Forks, N. D.,
Solicitors for Plaintiff.

F. G. Dorety,
J. P. Plunkett,
175 E. 4th St.,
St. Paul, Minn.
Of Counsel.

State of Minnesota,
County of Ramsey.—ss:

James T. Maher, being duly sworn, deposes and says that he is Right of Way, Land & Tax Commissioner of the Great Northern Railway Company, plaintiff in the above entitled bill of complaint; that he has read the foregoing bill
28 of complaint and knows the contents thereof, and that the same is true to the knowledge of deponent.

JAMES T. MAHER.

Subscribed and sworn to before me this 14th day of February, 1934.

ALPHA M. CONLIN.
Notary Public, Ramsey County, Minn.

(Seal)

My commission expires July 9, 1935.

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29 Subpoena in Chancery.

United States of America,
District of North Dakota—ss.

The President of the United States of America

To J. J. Weeks, State Tax Commissioner; J. M. Baillie as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor and W. D. Conway as Treasurer of Benson County; Ole Colbornson as Auditor and Sam H. Wilson as Treasurer of Bottineau County; H. F. Magedanz as Auditor and Jerry Donovan as Treasurer of Burke County; F. Ford Doherty as Auditor and C. A. Baumgartner as Treas-

urer of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor and H. J. Oberman as Treasurer of Dickey County; R. H. Lynch as Auditor and O. A. Steffler as Treasurer of Divide County; S. W. Layman as Auditor and Hugh Peoples as Treasurer of Eddy County; J. B. McWethy as Auditor and M. P. Roberts as Treasurer of Foster County; Martin O. Haugen as Auditor and John Sandbek as Treasurer of Grand Forks County; P. A. Melgard as Auditor and R. J. Howden as Treasurer of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor and Oluf Erickson as Treasurer of McKenzie County; F. J. Haines as Auditor and Nels Hofland as Treasurer of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor and J. H. Hannesson as Treasurer of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor and W. C. Budke as Treasurer of Renville County; George J. Fischer as Auditor and Karl L. Mikkelson as Treasurer of Richland County; Jas. H. Penny as Auditor and Allister McKay as Treasurer of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. H. Mustad as Auditor and Florence Carlson as Treasurer of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortensen as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,—Greeting:

We Command You, and each of you, that you appear before the Judge of the District Court of the United States for the District of North Dakota, at Fargo, on the 7th day of March, A. D. 1934, to answer to the bill of complaint of Great Northern Railway Company this day filed in the office of the Clerk of said Court, and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon

pain of said bill being taken as confessed against you and decree pronounced accordingly.

Witness, the Honorable Andrew Miller, Judge of the District Court of the United States, at Fargo, this 15th day of February, A. D. 1934.

(Seal) J. A. MONTGOMERY, Clerk,
By E. R. Steele, Deputy.

Memorandum.

The above-named defendants are notified that unless they file their answer or other defense in the Clerk's office of said Court, at Fargo, aforesaid, on or before the twentieth day after service, excluding the day thereof, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

J. A. MONTGOMERY, Clerk,
By E. R. Steele, Deputy.

"Filed Mar. 6, 1934. J. A. Montgomery, Clerk."

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30 The foregoing subpoena in chancery was duly served on the 17th day of February, 1934, upon the following defendants:

Martin O. Haugen, Auditor, and John Sandbek, Treasurer, of Grand Forks County, North Dakota; F. Ford Doherty, Auditor, and C. A. Baumgartner, Treasurer, of Cass County, North Dakota;

Said subpoena was duly served on the 19th day of February, 1934, upon the following defendants:

J. M. Bailie, Auditor and L. T. Halvorson, Treasurer, of Barnes County, North Dakota; G. A. Gilbertson, Auditor, and W. D. Conway, Treasurer, of Benson County, North Dakota; H. F. Magedanz, Auditor, and Jerry Donovan, Treasurer of Burke County, North Dakota; John A. Dawe, Auditor, and H. J. Oberman, Treasurer, of Dickey County, North Dakota; Otto G. Krueger, Auditor, and Edith Darcy, Treasurer of Wells County, North Dakota; A. G. Torgerson, Auditor, and Bert A. Balerud, Treasurer, of Ward County, North Dakota; G. H. Mustad, Auditor, and Florence Carlson, Treasurer, of Steele County, North Dakota; J. O. Peterson, Auditor, and F. J. Burckhard, Treasurer, of Ramsey County, North Dakota; S. W. Lyman, Auditor, and Hugh Peoples, Treasurer, of Eddy County, North Dakota; J. B. McWethy, Auditor and

M. P. Roberts, Treasurer, of Foster County, North Dakota; E. W. Olson, Auditor, and Oscar R. Fisher, Treasurer, of McHenry County, North Dakota; Arne Tollefson, Auditor, and Oluf Erickson, Treasurer, of McKenzie County, North Dakota; F. J. Haines, Auditor, and Nels Hofland, Treasurer, of Mountrail County, North Dakota; O. A. Spillum, Auditor, and O. T. Tofsrud, Treasurer, of Pierce County, North Dakota; Peter Jorgenson, Auditor, and J. J. Schindele, Treasurer, of Nelson County, North Dakota;

Said subpoena was duly served on the 20th day of February, 1934, upon the following defendants:

Wm. W. Felson, Auditor, and J. H. Hannesson, Treasurer, of Pembina County, North Dakota; P. A. Melgard, Auditor, and R. J. Howden, Treasurer, of Griggs County, North Dakota; Jas. H. Penny, Auditor, and Allister McKay, Treasurer, of Rolette County, North Dakota; W. J. LaMarre, Auditor, and Benj. A. Gudajtes, Treasurer, of Walsh County, North Dakota; Morton Mortensen, Auditor, and Oscar N. Lee, Treasurer, of Williams County, North Dakota; R. H. Lynch, Auditor, and O. A. Steffler, Treasurer, of Divide County, North Dakota;

Said subpoena was duly served on the 21st day of February, 1934, upon the following defendants:

George J. Fischer, Auditor, and Karl L. Mikkelson, Treasurer of Richland County, North Dakota; Gerhard D. Olson, Auditor, and Thomas P. Strand, Treasurer, of Traill County, North Dakota; Ole Colbornson, Auditor, and Sam H. Wilson, Treasurer, of Bottineau County, North Dakota;

Said subpoena was duly served on the 23rd day of February, 1934, upon the following named defendants:

Otto Rasmussen, Auditor, and A. A. Wilson, Treasurer, of Cavalier County, North Dakota;

Said subpoena was duly served on the 24th day of February, 1934, upon the following defendants:

A. T. Mooney, Auditor, and John Gang, Treasurer, of Towner County, North Dakota;

Said subpoena was duly served on the 26th day of Feb-
31 ruary, 1934, upon the following defendants:

C. E. Colcord, Auditor, and W. C. Budke, Treasurer, of Renville County, North Dakota;

Said subpoena was duly served on the 1st day of March, 1934, upon the following defendant:

J. J. Weeks, Tax Commissioner of the State of North Dakota;

Said subpoena was duly served on the 2nd day of March, 1934, upon the following defendants:

R. W. Safstrom, Auditor, and H. O. Webster, Treasurer, of Sargent County, North Dakota.

"Filed Mar. 6, 1934. J. A. Montgomery, Clerk."

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32 Answer to Bill of Complaint.

I.

Now come the above named defendants and for their special Answer in the nature of a plea to the jurisdiction state that this court ought not to take jurisdiction of the cause of action alleged in the Bill of Complaint filed herein for the following reasons:

A.

This action does not arise under the fourteenth amendment of the Constitution of the United States.

B.

That the taxes of which the plaintiff complains were not fraudulently levied but on the contrary were legally and justly levied pursuant to the statutes of the State of North Dakota.

C.

That the assessment complained of in plaintiff's Bill of Complaint is a fair, just and equitable assessment and not in excess of the actual value of plaintiff's property.

D.

That the taxes and assessment complained of in plaintiff's Bill of Complaint are not discriminatory as against the plaintiff.

E.

That the taxes complained of in plaintiff's Bill of Complaint do not improperly burden interstate commerce in derogation of the power of Congress to regulate interstate commerce under the Constitution of the United States.

F.

That the plaintiff has a full, complete, speedy and adequate remedy at law and that this Court is without jurisdiction to

determine this matter in controversy because of lack of equity.

33 II.

Further answering the plaintiff's Complaint, the defendants allege:

A.

Defendants admit the allegations contained in paragraphs I, II, IV, V and VI.

B.

Answering Paragraph III of said Complaint, the defendants deny that this action arises under the Fourteenth Amendment to the Constitution of the United States and further deny that the assessments and taxes complained of are in amounts in excess of the actual value of the property assessed or were in any manner assessed or levied contrary to the Constitution and statutes of the State of North Dakota, or that the same are unjust or discriminatory or in violation of the Constitution of the United States or improperly burden interstate commerce in derogation of the power of Congress to regulate interstate commerce or take property without due process of law or impose an arbitrary or unreasonable burden upon commerce among the states and foreign nations, and on the contrary these defendants allege that said assessments and taxes were in all things legally, fairly, and justly made and levied.

C.

Answering Paragraph VII of the Complaint the defendants admit that the State Board of Equalization did assess plaintiff's railway property within the State of North Dakota for the year 1933 at the sum of $78,832,888.00, and that said assessment was certified out to the several county auditors above named upon the basis of the total mileage of the plaintiff in each of said counties, but these defendants specifically deny that said assessment was in excess of the true and full value in money of plaintiff's property. Defendants allege that each defendant has insufficient knowledge of the taxes allocated to the various other counties represented to enable him to form a belief as to the truth of the allegations and computations contained in the schedules set forth in said paragraph and therefore they deny the same and put the plaintiff to its proof thereof.

34 D.

Further answering Paragraph VII of the Complaint, defendants deny that 43% of said tax levy is excessive, and

on the contrary allege that the assessment made represents the true value of plaintiff's property in North Dakota in money.

E.

Answering Paragraph VIII of the Complaint these defendants allege that it is the duty of the State Board of Equalization to assess the property of plaintiff's railway in accordance with the terms of Section 2122 Supplement to the 1913 Compiled Laws of North Dakota, 1913-1925, which provides:

"All property subject to taxation shall be assessed at its true and full value in money. In determining the true and full value of real and personal property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price at which said property would sell at auction or at forced sale or in the aggregate with all the property in the town or district, but he shall value each article or description of property by itself and at such sum or price as he believes the same to be fairly worth in money. In assessing any tract or lot of real property the value of the land, exclusive of improvements shall be determined; also the value of all taxable improvements and structures thereon, and the aggregate value of the property, including all taxable structures and other improvements, excluding the value of crops growing upon cultivated lands. In valuing any real property upon which there is a coal or other mine or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash."

That the law above stated applies to the State Board of Equalization as well as assessors. The State Board of Equalization is thereby required to exercise its best judgment and discretion as to the assessment of operating property of railroad companies and is required to assess such property at such amount as the Board believes such property to be fairly worth in money. Said law does not permit the State Board of Equalization to substitute for statutory and constitutional provisions, requiring the Board to exercise its judgment and discretion as to value, any arbitrary formula, method or rule based upon operating and financial statistics of railroads.

Section 2074 Compiled Laws of North Dakota 1913 provides in part that the term "true and full value" means the

usual selling price at the place where the property to
35 which the term is applied shall be at the time of the assessment, being the price which could be obtained therefor at private sale and not at a forced public auction sale.

These defendants admit that due to the fact that neither entire railroad systems nor the portions of railroad systems within any given state are ordinarily sold, and due to the resulting difficulty in arriving at the usual selling price of railroad property from the evidence of sales of similar property, the practice has grown up in the State of North Dakota and elsewhere of basing the valuation of railroad systems and the allocation of the system values to the states upon certain arbitrary formulas developed by statisticians and taxing authorities. These formulas and arbitrary methods of arrving at values during normal times served to reflect to a reasonable degree of accuracy the true value of railroad property. Defendants allege, however, that since November, 1929, there has existed a world-wide panic, depression and financial crisis which has artificially and unnaturally affected the prices of stocks and bonds, and the earnings of all businesses, and destroyed much of the evidentiary value of the results of such arbitrary formulas.

The State Board of Equalization of the State of North Dakota and the taxing authorities of other states have used and considered said formulas based upon the operating and financial statistics of railroads as evidence of the value of railroads but not as the exclusive source of evidence of value.

The commonly accepted practice in determining the system value of railroads, which practice has been followed by the tax officers and agents of the plaintiff has been first to determine the value of the entire railroad system and then to allocate such system value among the several states through which the system operates. The financial and operating statistics furnished by the plaintiff to the State Board of Equalization in the year 1933 and for many years previous thereto were based upon this method of determining the value and never, either in 1933 or at any prior time has the plaintiff or any other railroad presented to the State Board of Equalization any plan or statistics which would enable it to determine the valuation of the property of the railroad within the state through the attemped capitalization of the net earnings of the railroad within the state.

Railroad accounting practices are not such as to per-
36. mit any determination of value upon the capitalization of net earnings within the state for the reason

that it is impossible accurately to make any segregation of income and operating costs by state lines.

Defendants allege that the State Board of Equalization pursuant to its constitutional and statutory duty considered the financial and operating statistics of the plaintiff and the computations of value based upon the accepted formulas together with all other evidence before it and matters of common knowledge including the conditions of the times and from all such evidence arrived at the assessment herein complained of as its honest judgment as to the full and true value of the plaintiff's property in North Dakota in money.

F.

Answering Paragraph IX of plaintiff's Complaint, these defendants deny that the assessment made by the State Board of Equalization in the year 1933 or in any prior year resulted in assessing in North Dakota property actually located in other states or in over-valuing plaintiff's railroad system, and on the contrary these defendants allege that under all of the standard and accepted and generally used and approved formulas for determining railroad valuation, including the formulas adopted by this Court in railroad tax litigation within the past year, the assessment of the plaintiff for several years prior to 1933 was less than the actual full and true value of the railroad within this state, and further allege that the assessment for 1933 constituted a fair, reasonable and just valuation of the North Dakota property of the plaintiff.

G.

Answering Paragraph X of plaintiff's Complaint, the defendant admits that in the year 1932 the State Tax Commissioner did present to the State Board of Equalization computations based upon a determination of the system value of the railroad by the use of a composite of the average stock and bond values of the plaintiff for a period of five years preceding the assessment, and the average value ascertained by capitalizing net earnings for five years preceding the assessment and by applying and allocating such system value to the State of North Dakota upon the basis of the five factors set forth in Paragraph IX of the Complaint,
37 which said formula produced a value of $76,115,715.00; that he also made an allocation of the same system value to North Dakota by another method, using for the purpose of allocation only factors numbered 3, 4, and 5 in said list which produced a value of $79,417,825.00. In addition thereto defendants allege that the Tax Commissioner

presented the computations based upon a third method of allocating the system value by which he applied the average of the factors numbered 1, 3, 4 and 5 in the above list which produced a valuation of $80,671,790.00. Defendants further allege that upon this evidence and upon all other evidence and matters of common knowledge before it the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024.00.

Defendants further allege that in the year 1933 the State Tax Commissioner and the plaintiff did present to the State Board of Equalization the financial and operating statistics of the plaintiff's railroad and reports and computations based upon the formulas used in 1932 and other evidence of value, and that the Board of Equalization after full consideration of said statistics, computations, reports, and all other evidence of value and matters of common knowledge, did fix the assessment of plaintiff's property in North Dakota for the year 1933 at $78,832,888.00, which said amount represented the honest judgment of the State Board of Equalization and the true and full value of the plaintiff's North Dakota property in money.

H.

Answering Paragraph XI the defendants deny that the system value determined by the State Board of Equalization during the year 1933 or any prior year was excessive because the amounts deducted from stock and bond values as the value of plaintiff's properties and securities not forming a part of its railroad system were inadequate and less than the full values of such properties and securities, and on the contrary allege that a large portion of the non-operating property of the plaintiff consists of stocks and bonds which are not quoted on the market and upon which no actual market value can be placed. Defendants allege that for many years past a large amount of said stocks and bonds have paid no dividends or interest whatever. The computations presented by the State Tax Commissioner and
38 the plaintiff to the State Board of Equalization deducted from the total stock and bond valuation of the plaintiff for non-operating property much more than the non-operating property was actually worth if computed upon the same basis as is contended for by the plaintiff for the valuation of its operating property.

Defendants deny that plaintiff's net earnings were capitalized at an inadequate rate percent, and on the contrary allege that they were capitalized at 6% which is the usual,

customary and accepted rate adopted by taxing authorities, and Courts, throughout the United States for normal times. Defendants allege that during the last four years there has existed a great national economic crisis and emergency which has temporarily destroyed the earning power of investments and defendants allege that a more accurate reflection of the value of the plaintiff's property would be produced by capitalizing the net income at 4%.

Defendants further deny that abnormal business conditions in 1928 and 1929 produced abnormally high earnings, and high stock and bond values, and on the contrary these defendants allege that the earnings of the railroad in 1928 and 1929 represent a fair average of the normal earning power of the railroad, and that the earnings since 1929 are abnormally low and are not a reflection of either the prospective or past value of the railway. These defendants allege that a five-year average of net earnings or of stock and bond values during abnormally depressed times such as the present is the shortest possible period which would give any accurate reflection of values, and that by averaging stock and bond values or net earnings over a period of seven to ten years the results produced would much more accurately reflect true values than the average over a three-year or five-year period.

I.

Answering Paragraph XII of the Complaint these defendants deny that the use of the allocation factors numbered 1, 3, 4 and 5 in Paragraph IX of the Complaint have resulted in assessing and taxing in North Dakota property owned by the plaintiff and located in other states, and in an over-assessment or over-valuation of plaintiff's property in North Dakota, and on the contrary allege that the best and most accurate system of allocating the system value among
39 the states is to make use of all five of the factors of allocation, and that an average of the five factors mentioned in Paragraph IX of the Complaint much more accurately and truly reflects the value of the railroad in any given state than the use of any one factor or group of said factors less than five.

Defendants specifically deny that the factor numbered 2 in Paragraph IX of the Complaint, being the physical property factor, as measured by cost of reproduction less depreciation, taken by itself constitutes a reasonable basis for allocating system values to the states for the reason that, as alleged in Paragraph VIII of the Complaint, the value of a railroad is dependent not upon the investment in property

but rather upon its value as a going concern. The state taxing authorities in placing an assessed valuation upon property are not concerned with the amount of the investment in the property, but with its market value. Defendants allege that the market value of the plantiff's property in North Dakota, as part of a railroad system in operation, is greatly enhanced by reason of the fact that the cost of operation and maintenance within this state is very low in comparison with other states, and that said cost of operation and maintenance is low by reason of the topography of this state as set forth and described in Paragraph XII of the Complaint. The physical property factor of allocation does not take into consideration the net earning power of the portion of the railroad within this state, but is based solely upon the investment in road and equipment. These defendants have no knowledge or information sufficient to form a belief as to the truth of the percentages of branch line and main line trackage in this and other states, the percentages of physical property per mile of line in this and other states, the amount of grading and embankment, bridges, tunnels, snow-protection, terminal property and physical property per mile of line in this and other states, and the percentage of cost of reproduction less depreciation per mile of line in this and other states, and therefore deny the same and put the plaintiff on its proof thereof.

J.

Answering Paragraph XIII of plaintiff's Complaint the defendants have no knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained and therefore defendants deny the same and put the plaintiff to its proof thereof.

K.

Answering Paragraph XIV of plaintiff's Complaint, defendants deny that the allocation factors of all track mileage, ton and passenger mileage and car and locomotive mileage are incorrect or inaccurate measures of the value of plaintiff's property within the State of North Dakota, and on the contrary allege that the use of the average of said three factors together with the factors of cost of reproduction less depreciation and gross earnings more fairly indicates the value of the portion of the railroad operating in any given state than does the use of any one factor or group of such factors less than five.

Defendants deny that the use of the allocation factors mentioned in Paragraph XIV results in apportioning to North

Dakota a part of the revenues collected for service actually performed in states of more expensive construction and operation, and on the contrary defendants allege that by reason of the lower cost of construction repairs, maintenance and operation within the State of North Dakota, that the average mile of line within this state is of a higher value than the average mile of line elsewhere as a part of an operating railroad system.

Defendants allege that the high rates for the movement of through-traffic fixed by the Interstate Commerce Commission as alleged in Paragraph XIV of the Complaint are charged alike for the mileage in North Dakota and other states, and that therefore the net revenue from the North Dakota mileage is greatly in excess of the net revenue in other states where construction, repairs, maintenance and operation are more expensive as alleged in Paragraph XIV of the Complaint.

L.

Answering Paragraph XV of plaintiff's Complaint, the defendants admit that the net earnings of the plaintiff's railroad system for the year 1932 had greatly decreased because of the abnormal business depression hereinbefore referred to, but allege that a three-year period gives no true or accurate indication of the average earnings of a railroad. Defendants further allege that if any arbitrary formula for determining value by the capitalization of earnings is to be used, it is essential that the same period should be
41 used from year to year. The use of a one-year period if used consistently would, over a long period of years, produce the same total results in taxation as would the use of a five-year period or any longer period. The use of a one-year period would produce violent fluctuations in the assessment from year to year whereas the use of a five-year period or longer period would maintain a less irregular assessment and produce more uniformity in taxes from year to year. For the past fifteen years it has been the practice of the Tax Commissioner in his calculations and of the railroads in their calculations to use a five-year period and to abandon the five-year period in favor of the three-year period during a time of depression would be to unjustly lower the assessed valuation of the railroads. In its evidence and computations presented to the Board of Equalization in 1933, the plaintiff used a five-year period for determining system value upon the capitalization of earnings method and presented no evidence, argument or computations in support of the use of a three-year period.

Further answering Paragraph XV Defendants admit that the average selling price of plaintiff's stocks and bonds for the calendar year preceding the 1932 assessment was $461,845,-051.00 and for the calendar year preceding the 1933 assessment was $296,301,177.00. The defendants deny that on the date of assessment the market value of plaintiff's stocks and bonds was only $229,485,500.00, and allege that the law does not fix any specified date as of which the assessment is made. Defendants allege that if at any time the stocks and bonds of the plaintiff were of a total market value as low as $229,-485,500.00 the time of such valuation was immediately following the national banking holiday declared by the President of the United States and at a time when the stock and bond markets were in a state of complete chaos, and that such market value as of such date gives no true indication of the value of plaintiff's stocks and bonds. Defendants allege that the average market value of plaintiff's stocks and bonds during the month of July, 1933, being the month immediately preceding the assessment of the plaintiff for 1933, was $375,-308,403.00.

42 Defendants further allege that the decrease in plaintiff's stock and bond values was represented largely by a decrease in the market value of the stock of the plaintiff, and that said market value of the stock was not an indication of the sound or considered judgment of investors as to the value of the stock but was a result purely of panic psychology and speculation. The average market price of plaintiff's stock alone during the year 1932, being the year immediately preceding the assessment, was $32,830,915.00, whereas in the year 1930 dividends had been declared upon said stock amounting to $18,673,035.00 and during the year 1931 dividends had been declared in the sum of $6,220,716.00, making a total dividend during the two years preceding 1932 of approximately 80% of the entire market price of the stock during 1932. Defendants further allege that during the year 1933 and previous to the assessment date the market price of the shares of stock of the plaintiff had at one time fallen to the sum of $4.62 per share, whereas in 1930 a dividend of approximately $7.50 per share, and in 1931 a dividend of approximately $2.50 per share had been declared and paid. Defendants therefore allege that the market price of the stocks and bonds, and particularly of the stocks of the plaintiff during the years 1932 and 1933 give no indication whatever of the true value of the plaintiff's railroad.

Defendants deny that a computation of the value of plaintiff's property in North Dakota for 1933 by the method used

in 1932 and prior years would have produced an assessment of $15,000,000.00 less than that actually made, and on the contrary allege that an application of the formulas presented to the Board of Equalization in prior years in 1933 would have produced a reduction of approximately $13,000,000.00 only. Defendants further allege that all of the statistics, formulas and computations and all other evidence and matters of common knowledge were considered by the Board in arriving at its 1933 assessment.

43 M.

Answering Paragraph XVI, defendants deny that the cost of reproduction of plaintiff's system as of December 31, 1932, was only $564,608,688, and on the contrary allege that the cost of reproduction less depreciation as reported by plaintiff to the State Tax Commissioner as of December 31, 1932, was $628,106,411.00 for the system and $89,964,680.00 for the State of North Dakota. Defendants further allege that the investment in road and equipment as appears by the books of the plaintiff in the years 1928 and 1932 was as follows:

December 31, 1928	$567,000,000.00
December 31, 1929	570,000,000.00
December 31, 1930	580,000,000.00
December 31, 1931	589,000,000.00
December 31, 1932	589,000,000.00

And that the net earnings of the plaintiff upon its investment in road and equipment as set up in the books of the company was 5.51% in 1928, 5.69% in 1929, 3.78% in 1930, 2.15% in 1931, and 0.22% in 1932, and the defendants therefore deny that plaintiff is unable to earn a fair rate of return upon the full reproduction cost less depreciation.

Defendants have no knowledge sufficient to form a belief as to the truth of the allegation that the assessed value of plaintiff's property for 1933 in all of the other states in which any part of its line is located, and which make ad valorem assessments is 52.32% of the cost of reproduction less depreciation in those states, and therefore deny the same, and put the plaintiff on its proof thereof. Defendants further allege that if said percentage is the true and correct figure it is misleading and inaccurate for the reason that in many of the other states through which plaintiff's system operates assessments are made upon a fractional basis only.

N.

Answering Paragraph XVII defendants deny each and all of the allegations contained in said Paragraph, and allege that the figures and percentages set forth in said paragraph could have been arrived at only through the use of some new, unsound and untried formula or method of computation of value, and defendants allege that no statistics, for-
44 mula, or computations were presented to the State Board of Equalization in the year 1933 which would substantiate the figures and percentages alleged in Paragraph XVII.

O.

Answering Paragraph XVIII of plaintiff's Complaint, defendants deny that the Board of Equalization deliberately, intentionally, or knowingly over-valued or over-assessed plaintiff's property or ignored any of the facts, figures or computations material to a determination of the value of plaintiff's property, and deny that any value of property located in other states was assessed in North Dakota, and deny that the board acted without logical processes of reasoning or basis of fact, and deny that said assessment was made arbitrarily, fraudulently or excessively and on the contrary these defendants allege that said assessment for 1933, and for all prior years, was made after full and fair consideration of all the facts herein set forth and of all other facts material to a determination of the value of plaintiff's railroad and that the assessment made in 1933 represented the honest, fair, and just determination of the Board of Equalization.

Defendants allege that under the recognized, accepted and usual methods of ascertaining railroad values the assessment for the year 1929 was approximately 100% of full and true value, for 1930 was approximately 96% of full and true value, for 1931 was approximately 96.5% of full and true value, and for 1932 was 100.3% of full and true value, and that the apparent over-assessment for the year 1933, if computed strictly upon the arbitrary formulas hereinbefore referred to is occasioned by the fact that the application of the arbitrary formulas hereinbefore referred to had lost most of their evidentiary value by reason of the panic conditions existing in 1933 as hereinbefore referred to, and that in order to arrive at any honest, fair, or just determination of the value of plaintiff's property in 1933 it was necessary

to add to the results produced by such arbitrary formula large amounts in order to compensate for the artificially and unnaturally low prices of stocks and bonds as hereinbefore alleged, and for the temporary effect upon plaintiff's net earnings of the collapse of business generally throughout the world.

45

P.

Answering Paragraph XIX of plaintiff's Complaint, defendants allege that other property in the State of North Dakota was assessed upon the basis of full and true market value as near as the same could be determined from such evidences of value as were available. Defendants allege, however, that the market for other property in the state was destroyed by the depression hereinbefore referred to and that it was impossible during the year of 1933 accurately to assess any property, and that as a matter of fact other property was assessed vastly in excess of market value if the term "market value" is to be construed as the value as determined by the sales of like property during the year 1933. Defendants further allege that on the basis of earnings farm property in the State of North Dakota, which constitutes a large portion of the property of the state, would have had absolutely no value during the past five years for the reason that such property had produced no earnings. Defendants therefore deny that the plaintiff was discriminated against in its 1933 assessment, and deny that such assessment imposes upon the plaintiff any unfair or unwarranted share of the tax burden of the state as compared with other taxpayers.

Defendants specifically deny that the collection of said taxes would deprive plaintiff of property without due process of law, would improperly emburden interstate commerce, would obstruct plaintiff in the transportation of persons and property in interstate commerce or would in any manner violate any of the provisions of the Constitution of the United States or of the State of North Dakota.

Q.

Answering Paragraph XX of plaintiff's Complaint, defendants deny that there is any exaggeration or distortion in the allocation factors mentioned in Paragraph IX of the Complaint, and deny that the method of computation set forth in Paragraph XX would produce any fair, reasonable, or accurate determination of the value of plaintiff's property in North Dakota. Defendants further allege that the formula

or method of computation set forth in Paragraph XX is a formula prepared by the plaintiff for use in this case only; that the said formula has never been used or contended
46 for by the plaintiff before the State Board of Equalization and was not presented to it at its 1933 meeting; that the method has not been used or followed by any other state through which the plaintiff's railroad operates; and that it is a new untried unrecognized and unreasonable formula or method for determining value.

Defendants allege that the formula therein set forth gives undue weight to the physical property factor of allocation which said physical property factor gives no indication whatever of the actual value for railway purposes of the property of the plaintiff located within this state.

R.

Answering Paragraph XXI of Plaintiff's Complaint, defendants admit the net earnings for the years 1928 to 1932 as set forth in said paragraph, but deny that the earning power of the plaintiff's railway system at the date of assessment did not exceed the sum of $12,000,000.00 per year, and on the contrary allege that from the years 1923 to 1929 inclusive the net earnings of the plaintiff never fell below $24,000,000.00 in any year, and from 1925 to 1929 both inclusive, the net income never fell below $28,000,000.00, and that the average annual net income for the five-year period ending upon December 31, 1926, was $25,153,298.00, for the five years preceding December 31, 1927, was $27,538,486.00, for the five years preceding December 31, 1928, was $28,850,902.00, for the five years preceding December 31, 1929, was $30,502,149.00, for the five years preceding December 31, 1930, was $29,429,414.00, for the five years preceding December 31, 1931, was $25,507,212.00, and for the five years preceding December 31, 1932, was $19,924,818.00. Defendants therefore allege that the present and prospective earning power of plaintiff's railroad is a sum in excess of $20,000,000.00 per year. Defendants deny that the capitalization of net earnings at 7% would produce any reasonable or accurate indication of the value of plaintiff's railroad, and on the contrary allege that a much more accurate, just and fair valuation in view of the national crisis and depression hereinbefore referred to and in view of the reduced income upon all other investments would be produced by capitalizing said net income at the rate of
4%.

47 S.

Answering Paragraph XXII Defendants allege that the total system value of the plaintiff, exclusive of non-operat-

ing property as computed by the usual accepted and reasonable methods of arriving at railroad valuations for the year ending December 31, 1932, was $413,223,044.00. Defendants allege that the value of non-operating properties set forth in the 1932 report of the State Tax Commissioner to the Board of Equalization was and is excessive for the reason that said non-operating properties had greatly depreciated in value, and that the net taxable system value as produced by the computations of the State Tax Commissioner in 1932 was actually much less than the full and true market value thereof.

Defendants deny that the full and true value in money of plaintiff's railroad system on the date of assessment was $322,080,233.00, and on the contrary allege that the true and correct value in money of plaintiff's railroad system was a sum in excess of $413,233,044.00.

T.

Answering Paragraph XXIII defendants deny that the full and true value in money of plaintiff's property in North Dakota on the date of assessment did not exceed $45,000,000.00, and on the contrary allege that the application of the usual customary and reasonable and accepted formulas of allocation to the system value of $413,233,044.00 produces a valuation in the State of North Dakota of $78,514,278.00, and defendants allege that said amount represents a determination of the value of the plaintiff's North Dakota property upon the basis used and accepted by the taxing authorities of the plaintiff and other railroads for a long period of years before the Board of Equalization.

Defendants allege that there is no accurate method whereby the net earnings of a railroad may be determined in any given state.

U.

Answering Paragraph XXIV these defendants admit that the laws of the State of North Dakota contain the requirements set forth in Paragraph XXIV, but defendants specifically deny that the effect of said statutes and the enforcement thereof by the officers therein mentioned would result in many vexatious proceedings resulting in expense, loss, or embarrassment to the plaintiff or in any impediment to
48 the management and operation of plaintiff's business.

Defendants deny that the plaintiff has no adequate or complete remedy at law, and on the contrary allege that the plaintiff has a complete, adequate and speedy remedy in the

Courts of the State of North Dakota by the payment of said taxes under protest and as provided in Chapter 286 of the Laws of North Dakota for the year 1931, and which provides:

"1. That any person (including any firm or corporation) against whom any tax is levied, or who may be required to pay the same, who pays such tax under protest to the County Treasurer, giving notice at the time of payment of the reasons for such protest, may in writing at any time within Sixty (60) Days thereafter apply to the Board of County Commissioners, under the provisions of Section 2241c of the 1925 Supplement to the Compiled Laws of North Dakota for the year 1913, for an abatement, adjustment or refundment of taxes thus paid, and may within Sixty (60) Days after notice of rejection of such application commence an action against such County Treasurer for the recovery thereof. Such application shall show the post office address of the applicant and notice by registered mail addressed to such applicant shall be notice of rejection of applicant's claim. If the Court determines that such tax was unlawfully collected, in whole or in part, for any reason going or pertaining to the merits of the tax, it shall enter judgment accordingly, and such judgment shall be paid upon final determination of the action. Both parties shall have the right of appeal as in other actions.

"2. Whenever taxes have been paid under protest the County Treasurer shall keep money thus paid and collected in a separate fund known as 'Taxes Paid Under Protest Fund' and such moneys shall not be paid or disbursed to the State, to any fund of the County, or to any local taxing district until the period prescribed in Section One (1) of this Act has expired, and in case an action is commenced the County Treasurer shall retain in such fund until such action shall be finally determined, that part of portion of the tax paid under protest, which the plaintiff in his complaint, contends is valid or illegal."

Defendants further allege that plaintiff has another complete, adequate and speedy remedy in the Courts of the State of North Dakota, which remedy is provided by Chapter 276, Session Laws of North Dakota for the year 1931, which provides, in substance, that any person (including any firm or corporation) may apply for abatement or refund of taxes based upon an invalid, inequitable or unjustly excessive assessment; that the Board of County Commissioners shall, by a majority vote, either approve or reject the application in whole or in part; and that such application for abatement or refund of taxes approved by the Board of County Commis-

sioners shall be effective when approved by the State Tax Commissioner; and that an appeal from such decision may be taken to the District Court by any person aggrieved,
49 and a trial de novo of the entire issue had in said Court.

Defendants deny that the interposition of a Court of equity is necessary to preserve the rights of the plaintiff or secure to the plaintiff any relief which might lawfully be afforded the plaintiff.

V.

Answering Paragraph XXV each of the defendants has no information sufficient to form a belief as to whether or not a tender or offer to pay the other defendants has been made as alleged in Paragraph XXV, and defendants therefore deny the same and put the plaintiff to its proof thereof.

W.

Defendants further allege that a writ of injunction is not necessary to preserve the rights of the plaintiff, and that all of the acts of the defendants heretofore done and hereafter to be done have been and will be in conformity to law.

Wherefore, the defendants pray:

(1) That said Bill of Complaint be dismissed for want of equity and want of jurisdiction in the federal courts over the cause of action alleged herein and they be discharged with their costs.

(2) That the defendants having fully answered the Bill of Complaint herein, that they be hence dismissed with costs and disbursements herein taxed against the complainant.

(3) For all other and further relief as to the court may appear meet and just.

Dated at Bismarck, North Dakota, March 7, 1934.

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Attorneys for Defendants.

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W. A. JACOBSEN,
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51

F. W. MEDBERRY,
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OLAF M. THORSON,
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HELGI JOHANNESON,
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State's Attorney of Ramsey County, North Dakota, and Attorney for Defendants, J. O. Peterson, as Auditor and F. J. Burckhard, as Treasurer of Ramsey County. P. O. Address, Devils Lake, North Dakota.

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CLIFFORD SCHNELLER,
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D. J. McLENNAN,
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A. LESLIE,
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E. T. MELDAHL,
State's Attorney of Steele County, North Dakota, and Attorney for Defendants, G. H. Mustad, as Auditor and Florence Carlson, as Treasurer of Steele County. P. O. Address, Finley, North Dakota.

J. J. KEHOE,
State's Attorney of Towner County, North Dakota, and Attorney for A. T. Mooney, as Auditor and John Gang, as Treasurer of Towner County. P. O. Address, Cando, North Dakota.

W. M. BACKSTROM,
State's Attorney of Traill County, North Dakota, and Attorney for Defendants, Gerhard D. Olson, as Auditor and Thomas P. Strand, as Treasurer of Traill County. P. O. Address, Hillsboro, North Dakota.

T. I. DAHL,
State's Attorney of Walsh County, North Dakota, and Attorney for Defendants, W. J. LaMarre, as Auditor and Benj. A. Gudajtes, as Treasurer of Walsh County. P. O. Address, Grafton, North Dakota.

ROBT. W. PALDA,
State's Attorney of Ward County, North Dakota, and Attorney for Defendants, A. G. Torgerson, as Auditor and Bert A. Balerud, as Treasurer of Ward County. P. O. Address, Minot, North Dakota.

52 J. W. SCHMIDT,
State's Attorney of Wells County, North Dakota, and Attorney for Defendants, Otto G. Krueger, as Auditor and Edith Darcy, as Treasurer of Wells County. P. O. Address, Fessenden, North Dakota.

WALTER O. BURK,
State's Attorney of Williams County, North Dakota, and Attorney for Defendants, Morten Mortenson, as Auditor and Oscar N. Lee, as Treasurer of Williams County. P. O. Address, Williston, North Dakota.

Endorsed on the back as follows: "(Title of Case) Answer To Bill Of Complaint. Due and personal service of a copy of the within Answer to Bill of Complaint is hereby admitted

(3) This action involves, exclusive of interest and costs, a sum or value in excess of $600,000.00; and involves a sum or value in excess of $3,000.00 with respect to each of the counties and each of the defendants above named.

(4) In compliance with statutory requirements plaintiff has for many years, including 1933, furnished to the State Tax Commissioner data relating to its assets and liabilities, value of property, earnings, operating and other expenses, and taxes paid, and such other information as said Tax Commissioner has required for the purpose of determining what its annual assessment should lawfully be.

(5) For the year 1933, the State Board of Equalization of North Dakota made an assessment for plaintiff's
56 railway property in North Dakota fixing the value thereof at $78,832,888. Said Assessment was certified out to the several county auditors above named in the amount set forth in paragraph 7 of the complaint herein and as required by the laws of the State. Each county auditor then determined a taxable value for all property in his county, including railroad property at 50% of its full assessed value as required by law and levied a tax against the taxable value of plaintiff's property in his county in the amounts set forth in paragraph 7 of the complaint herein.

(6) The full actual value in money of plaintiff's property in North Dakota in 1933 did not exceed the sum of $47,297,732 upon which amount plaintiff has already paid taxes.

If the above finding be refused, plaintiff requests the court to find as follows:

The said assessment was more than 20% in excess of the actual value of plaintiff's property in North Dakota in 1933.

(7) There is no lawful and rational method of computation or judgment by which a value greater than $47,297,732 for plaintiff's property in North Dakota for 1932 could have been computed.

If finding No. 7 be refused, plaintiff requests the court to find as follows:

There is no lawful and rational method by which a value for plaintiff's property in North Dakota in 1933 could have been computed in excess of 80% of the amount of the said assessment.

(8) In 1932 and for many preceding years the assessments of plaintiff's property in North Dakota had been determined in the following manner:

A value for plaintiff's entire railroad system was determined by capitalizing plaintiff's average net railway operating income for the five years preceding the assessment at the rate of 6% and also by determining the average total market price of plaintiff's outstanding stocks and bonds during said preceding five years and apportioning such total market price as between plaintiff's railway operating property and its non-operating assets in the average of the proportions of their respective earnings and their respective cost or investment. The two values thus determined were then averaged and the average system value thus obtained was allocated to the railway operating property in North Dakota in the average of the ratios that the following
57 units in North Dakota bore to those of the entire system:

Miles of track, car miles and locomotive miles, ton miles and passenger miles, gross revenue, and physical property. In the gross revenue credited to North Dakota for the purpose of fixing this ratio was included a mileage prorate of the plaintiff's revenue on all interstate freight traffic passing into or through North Dakota.

(9) In the year 1933, a similar computation would have produced an assessment for plaintiff's property more than $13,000,000 less than the 1932 assessment, but notwithstanding this, the State Board of Equalization fixed the assessment for plaintiff's property in North Dakota for 1932 at identically the same rate per mile as in 1932.

(10) At all of the times herein mentioned, the plaintiff's railway system has included extensive terminals and costly tunnels, bridges, snowsheds and other mountain construction located in other states with no counterpart in North Dakota and has contained approximately 75% more physical property per mile of all track and nearly twice as much property per mile of road outside North Dakota than inside. As a result of terminal switching, mountain operation and other physical conditions, the average cost of plaintiff's operations per track mile, per car mile, per locomotive mile and per ton mile outside North Dakota has been substantially greater than inside and in the operation of the average locomotive and car mile in freight service outside North Dakota, substantially more tonnage has been moved than in similar operations inside the state. An allocation of plaintiff's system value to the property, in North Dakota upon the ratio described in finding No. 8 has credited to the property in North Dakota many millions of dollars worth of values belonging to properties located in other states and be-

yond the jurisdiction of North Dakota and the assessments based upon said allocations have resulted in effect, for several years last past, in levying taxes amounting to several hundred thousand dollars each year by governmental units in North Dakota against properties located in other states. At all of said times the assessing officers of the State of North Dakota had been and were advised by plaintiff of the facts set forth in this finding.

(11) During each of the years 1928 to 1933, inclusive, not over 13% of the total net earnings and of the total net earning capacity, of the plaintiff's railroad system has been contributed by plaintiff's operating property in North Dakota and accordingly the value of plaintiff's Property in
58 North Dakota has not exceeded 13% of the value of its entire railway system, while the use of the allocation factor mentioned in finding No. 8 has resulted in allocating to plaintiff's property in North Dakota more than 18% of plaintiff's system value.

(If the court is not convinced that the figure of 13% mentioned above is correct, plaintiff requests the court to make the above finding substituting 14%, or if not 14%, 15% for 13%).

(12) A computation of the value of plaintiff's railway system in 1933 by the method described in finding No. 8 would unlawfully increase the assessment of plaintiff's property in North Dakota by giving unjustified weight and effect to high earnings and high stock and bond prices in the years 1928 and 1929, and insufficient weight and effect to the lower earnings and lower stock and bond prices of 1930, 1931 and 1932.

(13) In 1933 and for many years previous, plaintiff owned non-operating assets, not forming a part of its railway system and located outside of North Dakota, having a value in excess of $150,000,000. The apportionment of the total market price of plaintiff's stocks and bonds as between plaintiff's railway system and its non-operating assets in the manner described in finding No. 8, partly in proportion to the respective cost or investment for such properties, would credit too much of the total market price of plaintiff's stocks and bonds to its railway operating property and would produce a computed system value of plaintiff's railway operating property in 1933 several million dollars in excess of its actual value.

(14) The probable prospective rate of return necessary throughout the year 1933 to attract capital for the purchase

of plaintiff's railway operating property was in excess of 7% per annum. A capitalization of plaintiff's actual or prospective net railway operating income at the rate of 6% or at any rate below 7% produced a computed value for plaintiff's railway system many millions of dollars more than its actual value and produced an assessment of plaintiff's property in North Dakota several million dollars in excess of its actual value.

(15) For the year 1934, the State Board of Equalization has fixed an assessment for plaintiff's property in North Dakota several million dollars in excess of any value which could be determined by the method set forth in finding No. 8 and has repeated its assessment, in effect, against property of plaintiff located in other states in the manner set forth in finding No. 8, notwithstanding the fact that
59 said Board of Equalization had previously been advised by plaintiff of the fact set forth in findings Nos. 8 and 10.

(16) At all of the times herein mentioned all other property subject to assessment and taxation in North Dakota was assessed at its true and full value in money. By reason of this fact and by reason of the assessment of plaintiff's property in North Dakota in amounts far in excess of its true and full value in money as above stated, an unwarranted and unlawful share of the tax burden of the State has been imposed upon plaintiff's property and said assessments have materially discriminated against plaintiff as compared with other taxpayers and owners of other property in North Dakota.

(17) The laws of the State of North Dakota impose heavy penalties upon all delinquent taxes and make all taxes assessed and levied against the plaintiff's property a lien against its property prior and paramount to other liens and a cloud upon its title. It is the duty of the defendant county treasurers to collect the taxes above referred to. The plaintiff has no adequate or complete remedy at law and cannot obtain relief except in equity.

(18) Plaintiff has paid 60% of all taxes levied against its property in North Dakota for 1933, which amounts to the payment of all taxes levied against an assessed valuation of $47,297,732. Said last named sum is the maximum amount upon which taxes could lawfully have been levied against plaintiff in North Dakota in 1933 and all further taxes levied as aforesaid are unlawful.

Plaintiff further requests the court to make the following conclusions of law:

(1) All of the assessment against plaintiff's property in North Dakota for 1933 in excess of the amount of $47,297,732 was and is unlawful and all taxes levied by virtue of said unlawful assessment were and are unlawful.

(2) Plaintiff is entitled to an injunction against the defendants and each of them restraining them from collecting or attempting to collect any taxes against plaintiff's property in North Dakota for the year 1933 in excess of the amounts already paid by plaintiff.

(3) Plaintiff is entitled to judgment for its costs and disbursements herein against defendant.

60 Respectfully submitted,

F. G. DORETY,
C. J. MURPHY,
Solicitors for Plaintiff.

All above proposed findings except as are in substance approved in signed findings are refused.

Oct. 24th, 1934.

ANDREW MILLER,
Judge.

—Indorsed on face as follows: "Filed Oct. 24, 1934. J. A. Montgomery, Clerk."

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61 (Findings of Fact and Conclusions of Law of the District Court.)

The above entitled action came on to be heard before the Court at the Court Room in the Federal Building in the City of Fargo, North Dakota, on the 2nd day of October, 1934; Messrs. F. G. Dorety, of St Paul, Minnesota, and C. J. Murphy, of Grand Forks, North Dakota, appearing for the plaintiffs and Messrs. P. O. Sathre, Attorney General of North Dakota, of Bismarck, North Dakota, and Harold D. Shaft, of Grand Forks, North Dakota, appearing for the defendants, and the Court having heard the pleadings of the parties, and the proofs adduced thereon, and having considered the same, the Court now makes the following:

Findings of Fact.

1. Plaintiff is a corporation organized under the laws of the State of Minnesota and now operates and for many years past has operated a railroad extending from St. Paul and Duluth, Minnesota, and Superior, Wisconsin, through the States of Minnesota, North Dakota, South Dakota, Iowa, Montana, Idaho, Washington and Oregon and into the State of California and the Dominion of Canada and lines running into or through thirty counties in North Dakota. Its head office and principal place of business is at St. Paul, Minnesota, and it is and has been engaged mainly in foreign commerce and commerce among the states as a common carrier of freight and passengers by said railroad and to a lesser extent in the transportation wholly within each of the states above named including the State of North Dakota. Its lines of railroad within North Dakota extend into the counties of Barnes, Benson, Bottineau, Burke, Cass, Cavalier, Dickey, Divide, Eddy, Foster, Grand Forks, Griggs, McHenry, McKenzie, Mountrail, Nelson, Pembina, Pierce, Ramsey, Renville, Richland, Rolette, Sargent, Steele, Towner, Traill, Walsh, Ward, Wells and Williams.

2. Defendants are citizens and residents of the state of North Dakota and hold the offices severally designated in the caption hereof. The county officers named in said caption are charged with the duty of enforcing taxes in their respective counties, based upon assessments made by the State Board of Equalization in North Dakota against plaintiff's property. Defendant J. J. Weeks as State Tax Commissioner is charged with the duty of enforcing collection of said taxes in the event of failure of said County officers to collect the same.

3. The suit involved, exclusive of interest and costs, a
62 sum in excess of $3,000.00 with respect to each of the counties above named into which plaintiff's lines of railroad extend, and there is a diversity of citizenship between the plaintiff and defendants requisite to give the Court jurisdiction of the parties hereto.

4. Under the statutes of the state of North Dakota it is the duty of the State Board of Equalization to equalize the assessment of all property in the several counties assessed by the local authorities so that all taxable property in the state, whether assessed by the State Board of Equalization or by local authorities, shall be assessed uniformly according to its true and full value in money. After equalization of the assessment upon all of the taxable property in the state, it is the duty of said State Board of Equalization to certify to each

county auditor the equalized value placed upon all taxable property within each county.

5. For the year 1933, the State Board of Equalization made an assessment for plaintiff's railway property fixing the value thereof within the State of North Dakota at $78,832,888, which said assessment was certified out to the several county auditors above named in the amounts set forth in paragraph 7 of the complaint herein and as required by the laws of the state. Each county auditor then determined a taxable value for all property in his county, including railroad property, at 50% of its full assessed value as required by law and levied a tax against the taxable value of plaintiff's property in his county in the amounts set forth in paragraph 7 of the complaint herein.

6. That at no time within the past ten years has the State Board of Equalization adopted any specific or definite formula or method of calculating the value of the railroads operating in the state of North Dakota, but the State Board of Equalization has at all times had before it, at the time of making such assessments, tables and formulas prepared by the railroads and the office of the Tax Commissioner of the state, and has considered the same in arriving at its assessments, but never has adopted the exact result of any of said tables, formulas or methds of computation of railroad valuations.

63 7. That the assessments of the Great Northern Railway Company's property in the State of North Dakota, made by the State Board of Equalization in the years 1929, 1930, 1931 and 1932 were each and all lawful and justified.

8. That for the year 1933 the State Board of Equalization, after hearing, at which hearing the plaintiff was represented and presented arguments and briefs and computations, fixed the assessment of plaintiff's property at the sum of $78,832,888, which sum was the same as the 1932 assessment except for a deduction of $17,136 for certain trackage of the plaintiff which had been removed.

9. The Court finds that there is no evidence in this case (other than certain evidence offered to show that the assessment was in excess of actual value) that said assessment was fraudulent or made with intent to defraud the plaintiff or that it was made by any unlawful or improper method or in violation of any legislative mandate.

10. The Court makes no finding as to what in the judgment of the Court constituted the full and true value in money of

the plaintiff's property in 1933, or as to whether or not the said assessment was excessive.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law.

1. That upon the record before this Court the assessment for 1933 was not fraudulently, arbitrarily or capriciously made, nor was it the result of a systematic, repeated or continuous practice of over-assessment, and that this court is therefore without jurisdiction to grant the relief prayed for in the bill of complaint.

2. That this action must be in all things dismissed, with costs and disbursements herein to be taxed against the plaintiff.

Dated this 24th day of October, 1934.

ANDREW MILLER, Judge.

Indorsed on face as follows: "Filed Oct. 24, 1934. J. A. Montgomery, Clerk."

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64 (Decree, October 24, 1934.)

This cause came on for hearing before the Court at the Court Rooms in the Federal Building in the City of Fargo, North Dakota, on the 2nd day of October, 1934, the plaintiff appearing by Messrs. F. G. Dorety, of St. Paul, Minnesota, and C. J. Murphy, of Grand Forks, North Dakota, and the defendants appearing by Messrs. P. O. Sathre, Attorney General of North Dakota, Bismarck, N. Dak., and Harold D. Shaft, of Grand Forks, N. Dak., and the parties having submitted their pleadings and proofs and arguments thereon, and the Court having considered the same and having made its Findings of Fact and Conclusions of Law herein, now, on motion of P. O. Sathre and Harold D. Shaft, attorneys for defendants,

It Is Ordered, Adjudged and Decreed that the bill of complaint herein be dismissed for want of equity, with costs to be taxed in favor of the defendants.

It Is Further Ordered that the foregoing decree be suspended and that the temporary injunction heretofore issued herein against the defendants restraining them, and each of them, from proceeding to collect the amount of taxes in controversy in this action, be and the same hereby is continued in force for a period of fifteen days from the date of this decree, for the

reason that the court is advised that immediate appeal is to be taken from this decree, and that irreparable injury might result in the event of an execution issuing pending the taking of such appeal.

Dated this 24th day of October, 1934.

ANDREW MILLER, Judge.

The proposed findings of fact tendered by the complainant, having been considered by the Court and refused, said complainant is allowed an exception to said ruling; and it is

Ordered that the complainant be allowed an exception to the findings of fact and decree which were signed and entered herein.

Dated October 24, 1934.

ANDREW MILLER, Judge.

Indorsed on face as follows: "Filed Oct. 24, 1934. J. A. Montgomery, Clerk."

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65 Petition for Appeal.

To the Honorable Andrew Miller, Judge of the District Court of the United States for the District of North Dakota:

Great Northern Railway Company, your petitioner, who is the plaintiff in the above entitled cause, prays that it may be permitted to take an appeal from the decree entered in the above cause on the 24th day of October, 1934, to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the Assignment of Errors which is filed herewith.

And your petitioner desires that said appeal shall operate as a supersedeas, and therefore prays that an order be made fixing the amount of the security which said plaintiff shall give and furnish upon such appeal and that upon giving such security all further proceedings in this Court be suspended and stayed until the determination of said appeal by the Circuit Court of Appeals.

And your petitioner respectfully shows that unless the temporary injunction heretofore issued in this cause against defendants restraining them from proceeding to collect the amount of taxes in controversy in this action is continued in force pending the appeal, your petitioner will be done an irreparable injury in the event that its appeal prevails, and

your petitioner therefore prays that said temporary injunction may be continued in force until the determination of this appeal by the Circuit Court of Appeals.

Dated November 7th, 1934.

F. G. DORETY,
C. J. MURPHY,
Solicitors for Plaintiff.

Indorsed on face as follows: "Filed Nov. 8, 1934. J. A. Montgomery, Clerk."

Order Allowing Appeal.

The petition of Great Northern Railway Company, plaintiff in the above entitled cause, for an appeal from the final decree is hereby granted and the appeal is allowed and upon petitioner filing a bond in the sum of Six Hundred Ten Thousand ($610,000.00) with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the decree made and entered in the above cause and shall suspend and stay all further proceedings in this
66 court until determination of this appeal by the Circuit Court of Appeals.

It is further ordered that the temporary injunction heretofore issued in this cause against the defendants restraining them and each of them from proceeding to collect the amount of taxes in controversy in this action be and the same is hereby continued in force until the determination of this appeal by the Circuit Court of Appeals for the reason that it appears that irreparable injury will otherwise result to the petitioner pending the determination of the appeal.

Dated this 8th day of November, 1934.

ANDREW MILLER,
District Judge.

Indorsed on face as follows: "Filed Nov. 8, 1934. J. A. Montgomery, Clerk."

Assignment of Errors.

Comes now, the said Great Northern Railway Company, Plaintiff and appellant in the above entitled cause and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment and decree of this court entered on the 24th day of October, 1934.

(1) The court erred in making its finding of fact No. 7 reading as follows: "That the assessments of the Great Northern Railway Company's property in North Dakota made by the state board of equalization in the years 1929, 1930, 1931, and 1932 were each and all lawful and justified," because the great preponderance of the testimony shows that all of said assessments were approximately 50% or more in excess of the actual value of the property assessed and that many millions of dollars in all of said assessments were in effect levied against property located in other states.

(2) The court erred in making its finding of fact No. 9 reading as follows: "The court finds that there is no evidence in this case (other than cer ain evidence offered to show that the assessment was in excess of actual value) that said assessment was fraudulent or made with intent to defraud the plaintiff or that it was made by any unlawful or improper method or in violation of any legislative mandate", because it appears from undisputed evidence or the great preponderance of the evidence.

67 1. that said assessment was at least 70% in excess of the actual value of the property

2. that said assessment was arrived at without any exercise of the function of valuation, and merely by adopting the assessment of a prior year in disregard of the fact that the value of the property had greatly decreased

3. that the assessment of 1932 which was adopted as and for the assessment of 1933 was arrived at by the following wrongful and unlawful methods

a. In effect by assessing many millions of dollars of property located in other states.

b. By attributing to plaintiff's railroad property many millions of dollars worth of values of assets not forming any part of plaintiff's railroad system and not located in any part in North Dakota.

c. By basing the value of plaintiff's railroad too largely upon earnings and stock and bond prices of 1928 and 1929 which did not afford proper evidence of value in 1933.

d. By basing such value upon a capitalization of the earnings of plaintiff's railroad at the rate of only 6%, whereas the undisputed evidence showed that a much higher rate should be used.

(3) The court erred in making its finding of fact No. 10 reading as follows: "The court makes no finding as to what

in the judgment of the court constituted the full and true value in money of the plaintiff's property in 1933 or as to whether or not the said assessment was excessive," for the reason that the court should have found that the said assessment was at least 70% in excess of actual value.

(4) The court erred in making its conclusion of law No. 1 reading as follows: "That upon the record before this court the assessment for 1933 was not fraudulently, arbitrarily or capriciously made, nor was it the result of a systematic, repeated or continuous practice of over-assessment, and that this court is therefore without jurisdiction to grant the relief prayed for in the bill of complaint," because the court should have concluded that the assessment of plaintiff's property for 1933 was fraudulently, arbitrarily and capriciously made, that it was the result of a systematic, repeated and continuous practice of over-assessment and that the court had jurisdiction to grant the relief prayed for in the bill of complaint.

68 (5) The court erred in making its conclusion of law No. 2 reading as follows: "That this action must be in all things dismissed with costs and disbursements herein to be taxed against the plaintiff."

(6) The court erred in entering its judgment dismissing this action and denying relief to plaintiff.

(7) The court erred in not finding that the full actual value in money of plaintiff's property in North Dakota in 1933 did not exceed the sum of $47,297,732, upon which amount the plaintiff has already paid taxes.

(8) The court erred in not finding that there is no lawful and rational method of computation or judgment by which a value greater than $47,297,732 for plaintiff's property in North Dakota for 1933 could have been computed.

(9) The court erred in failing to find that the assessment in 1933 and for many previous years was the result of allocating a system value of plaintiff's railroad to North Dakota in the average of the ratios that the following units in North Dakota bore to those of the entire system:

Miles of track, car and locomotive miles, ton and passenger miles, gross revenue, and physical property, the gross revenue credited to North Dakota including a mileage prorate of plaintiff's revenue on all interstate freight traffic passing into or through North Dakota.

(10) The court erred in failing to find that the assessment of plaintiff's property in 1933 by methods previously used and recognized by the state taxing authorities would have produced an assessment more than $13,000,000 less than the 1932 assessment which was in fact adopted as the 1933 assessment.

(11) The court erred in failing to make plaintiff's proposed finding of fact No. 10 reading as follows:

"At all of the times herein mentioned, the plaintiff's railway system has included extensive terminals and costly tunnels, bridges, snowsheds and other mountain construction located in other states with no counterpart in North Dakota and has contained approximately 75% more physical property per mile of all track and nearly twice as much property per mile of road outside North Dakota than inside. As a result of terminal switching, mountain operation and other physical conditions, the average cost of plaintiff's op-
69 erations per track mile, per car mile, per locomotive mile and per ton mile outside North Dakota has been substantially greater than inside and in the operation of the average locomotive and car mile in freight service outside North Dakota, substantially more tonnage has been moved than in similar operations inside the state. An allocation of plaintiff's system value to the property in North Dakota upon the ratio described in finding No. 8 (assignment No: 9, supra) has credited to the property in North Dakota many millions of dollars worth of values belonging to properties located in other states and beyond the jurisdiction of North Dakota and the assessments based upon said allocations have resulted in effect, for several years last past, in levying taxes amounting to several hundred thousand dollars each year by governmental units in North Dakota against properties located in other states. At all of said times the assessing officers of the State of North Dakota had been and were advised by plaintiff of the facts set forth in this finding."

(12) The court erred in failing to find that during each of the years 1928 and 1933, inclusive, not over 13% of the total net earnings and not over 13% of the total net earning capacity and the total value of the plaintiff's railroad system has been contributed by plaintiff's operating property in North Dakota and that during each of said years the state taxing authorities have assessed more than 18% of plaintiff's system value in North Dakota.

(13) The court erred in failing to find that the assessment here in question was increased many millions of dollars by

wrongfully giving too much weight to the high earnings and the high stock and bond prices of the years 1928 and 1929 and insufficient weight and effect to the lower earnings and prices of 1930, 1931 and 1932.

(14) The court erred in failing to find that the assessment in question included in effect an assessment against several million dollars worth of non-operating assets owned by plaintiff, located outside the State of North Dakota and not forming any part of its railroad system.

(15) The court erred in failing to find that the assessment in question was wrongfully increased many millions of dollars by capitalization of plaintiff's earnings at the rate of only 6%, and that a rate of return in excess of 7% was the lowest rate sufficient to attract capital for an enterprise similar to plaintiff's, and the lowest rate that could justifiably be used in capitalizing plaintiff's earnings.

(16) The court erred in failing to find that the state taxing authorities have repeated the above-mentioned wrongful methods in assessing plaintiff's property in North Dakota for 1934 after being fully advised as to the facts.

(17) The court erred in failing to find that all other property subject to assessment and taxation in North Dakota was assessed at its true and full value in money while plaintiff's property was assessed at approximately 170% of its true and full value in money and that thereby an unwarranted and unlawful share of the tax burden of the state has been imposed upon plaintiff's property and that the assessment in question has materially discriminated against plaintiff as compared with other taxpayers and other owners of property in North Dakota.

(18) The court erred in failing to find that plaintiff has no adequate or complete remedy at law and cannot obtain relief except in equity.

(19) The court erred in failing to conclude that all taxes levied against plaintiff's property in North Dakota for 1933 in excess of those levied against an assessed valuation of $47,297,732 and already paid by plaintiff, are excessive and unlawful.

(20) The court erred in failing to conclude that the collection of the taxes in question in this action would be an unlawful burden upon interstate commerce and would deprive plaintiff of property without due process of law in violation of the Constitution of the United States.

(21) The court erred in failing to conclude that plaintiff is entitled to an injunction against the defendants, and each of them, restraining them from collecting or attempting to collect any further taxes against plaintiff's property in North Dakota, for 1933.

(22) The court erred in failing to enter judgment in favor of the plaintiff for the relief prayed for in the complaint.

Wherefore, plaintiff prays that the said judgment and decree be reversed and for such other and further relief as to the court may seem just and proper.

F. G. DORETY,
C. J. MURPHY,
Solicitors for Plaintiff.

Dated at St. Paul, Minn., October 26, 1934.

71 Indorsed on face as follows: "Filed Nov. 8, 1934. J. A. Montgomery, Clerk."

Supersedeas Bond on Appeal.

Know All Men By These Presents, That we, Great Northern Railway Company, a Minnesota corporation, as principal, and Saint Paul Mercury Indemnity Company, of Saint Paul, a Delaware corporation, as surety, are held and firmly bound unto J. J. Weeks, State Tax Commissioner; J. M. Bailie, as Auditor and L. T. Halverson, as Treasurer of Barnes County; G. A. Gilbertson, as Auditor and W. D. Conway, as Treasurer of Benson County; Ole Colbornson as Auditor and Sam H. Wilson, as Treasurer of Bottineau County; H. F. Magedanz as Auditor and Jerry Donovan as Treasurer of Burke County; F. Ford Doherty, as Auditor and C. A. Baumgartner, as Treasurer of Cass County; Otto Rasmussen as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor and H. J. Oberman as Treasurer of Dickey County; R. H. Lynch as Auditor and O. A. Steffler as Treasurer of Divide County; S. W. Lyman as Auditor and Hugh Peoples as Treasurer of Eddy County; J. B. McWethy as Auditor and M. P. Roberts as Treasurer of Foster County; Martin O. Haugen as Auditor and John Sanbek as Treasurer of Grand Forks County; P. A. Melgard as Auditor and R. J. Howden as Treasurer of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor and Oluf Erickson as Treasurer of McKenzie County; F. J. Haines as Auditor and Nels Hofland as Treas-

urer of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor and J. H. Hannesson as Treasurer of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor and W. C. Budke as Treasurer of Renville County; George J. Fischer as Auditor and Karl L. Mikkelson as Treasurer of Richland County; Jas. H. Penny as Auditor and Allister McKay as Treasurer of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. H. Mustad as Auditor and Florence Carlson as Treasurer of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morton Mortenson as Auditor and Oscar N.
72 Lee as Treasurer of Williams County, all of the State of North Dakota in the full and just sum of Six Hundred Ten Thousand and no/100 Dollars ($610,000.00), to be paid to the said obligees or their successors in office, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents:

Sealed with our seals and dated this 7th day of November, 1934.

Whereas, lately in the District Court of the United States for the District of North Dakota in a suit depending between Great Northern Railway Company, plaintiff, and J. J. Weeks, State Tax Commissioner; J. M. Bailie as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor and W. D. Conway as Treasurer of Benson County; Ole Colbornson as Auditor and Sam H. Wilson as Treasurer of Bottineau County; H. F. Magedanz as Auditor and Jerry Donovan as Treasurer of Burke County; F. Ford Doherty as Auditor and C. A. Baumgartner as Treasurer of Cass County; Otto Rasmussen as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor and H. J. Oberman as Treasurer of Dickey County; R. H. Lynch as Auditor and O. A. Steffler as Treasurer of Divide County; S. W. Lyman as Auditor and Hugh Peoples as Treasurer of Eddy County; J. B. McWethy as Auditor and M. P. Roberts as Treasurer of Foster County; Martin O. Haugen as Auditor and John Sanbek as Treasurer of Grand Forks

County; P. A. Melgard as Auditor and R. J. Howden as Treasurer of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor and Oluf Erickson as Treasurer of McKenzie County; F. J. Haines as Auditor and Nels Hofland as Treasurer of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor and J. H. Hennesson as Treasurer of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor and W. C. Budke as Treasurer of Renville County; George J. Fischer as Auditor and Karl L. Mikkelson as Treasurer of Richland County; Jas. H. Penny as Auditor and Allister McKay as Treasurer of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. H. Mustad as Auditor and Florence Carlson as Treasurer of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as
73 Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortensen as Auditor and Oscar M. Lee as Treasurer of Williams County, all of the State of North Dakota, Defendants, a decree was rendered against the said plaintiff dated October 24, 1934, and the said plaintiff has petitioned for and been allowed by the Honorable Andrew Miller, Judge of the United States District Court for the District of North Dakota, an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and a citation has been issued directed to said defendants citing them to appear before the Circuit Court of Appeals at St. Louis, Missouri, within forty (40) days of the date of such citation, and

Whereas, on September 18, 1934, this court issued a temporary injunction against the defendants restraining them and each of them from taking action to collect an unpaid balance of taxes levied against the plaintiff for 1933 in the sum of $603,340.80, pending the further judgment of the Court, which temporary injunction has been continued in effect pending the said appeal.

Now, The Condition Of The Above Obligation is such that if the said plaintiff shall prosecute said appeal to effect, and answer all damages and costs if it fails to make good its plea and if the said plaintiff shall pay said taxes in the event that

the decree of said District Court is affirmed then the above obligation to be void, else to remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY,
By F. G. Dorety, Vice President.

Attest:
F. L. Paetzold,
Secretary (Corporate Seal)

SAINT PAUL MERCURY INDEMNITY COMPANY OF SAINT PAUL,
By C. F. Codere, Vice President.

Attest:
M. D. Price,
Secretary (Corporate Seal)

Roy T. Baker,
Countersigned: North Dakota Agent.

State of Minnesota,
County of Ramsey—ss.

On this 7th day of November, 1934, before me, a Notary Public within and for Washington County, personally appeared F. G. Dorety and F. L. Paetzold, to me personally known, who being each by me duly sworn did say that they are respectively the Vice President and Secretary of Great
74 Northern Railway Company, one of the corporations named in the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said F. G. Dorety and F. L. Paetzold acknowledged said instrument to be the free act and deed of said corporation.

JESSIE O. BOHRER,
Notary Public, Washington County, Minnesota.

My commission expires Aug. 13, 1941.

Here follows the Acknowledgment of Officers of the Saint Paul Mercury Indemnity Company of Saint Paul.

The foregoing bond is approved this 8th day of November, 1934.

ANDREW MILLER, Judge.

Indorsed on face as follows: "Filed Nov. 8, 1934. J. A. Montgomery, Clerk."

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75 Order Extending Time in Which to Perfect Appeal.

It appearing to the Court that the transcript of the evidence introduced at the trial herein cannot be furnished within the time required to file the record on appeal in the United States Circuit Court of Appeals, now, on motion of F. G. Dorety, solicitor for the complainant, and appellant, it is

Ordered that the time in which the record may be filed in the United States Circuit Court of Appeals, be and the same hereby is extended to the 10th day of January, A. D. 1935; and that the time be extended likewise for the preparation and settling, allowing and filing of the bill of exceptions herein, and such other preliminary matters to perfect the record on appeal.

Dated December 10th, A. D. 1934.

ANDREW MILLER, Judge.

Original mailed to the Clerk of United States Circuit Court of Appeals, at St. Louis, Missouri, on the 10th day of December, 1934.

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76 Statement of Evidence.

The above entitled action came duly on for hearing befor the Court, the Honorable Andrew Miller, presiding Judge, at Fargo, North Dakota, on the 2nd day of October, 1934, the plaintiff appearing by its attorneys, Messrs. F. G. Dorety, of St. Paul, Minnesota, and C. J. Murphy of Grand Forks, North Dakota, and the defendants by Hon. P. O. Sathre, Attorney-General of the State of North Dakota, and Mr. Harold D. Shaft of Grand Forks, North Dakota, whereupon the following proceedings were had.

Mr. Sathre: For the record we would urge our special plea to the jurisdiction of the Court. I do not want to enter into any argument on this point, the same point was urged a year ago in the Soo Line case and the Court is familiar with the argument we had at that time, but we do want to urge our objection to the jurisdiction of the Court as set forth on page

two of our answer and as particularly set forth in paragraph F that the plaintiff has a complete, speedy and adequate remedy at law and that the Court has no jurisdiction to determine this matter in controversy. The Court is entirely familiar with our argument.

P. B. BEIDELMAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Dorety:

77 My name is P. B. Beidelman. I reside in St. Paul, Minn., and am Freight Traffic Manager of the Great Northern Railway system. I am head of the Freight Traffic Department and the highest freight traffic officer of the company with the exception of the Executive Department.

I have been in the Freight Traffic Department of the Great Northern Railway for 34 years and have entire charge of all rate matters and freight solicitation. One of my duties is to make yearly forecasts of the freight earning possibilities of the system which are used in determining the expenditures for seasons ahead.

In making these forecasts, we consider the general business situation of the country and while it is largely guess work, our forecasts were surprisingly accurate up to about three years ago. I get monthly reports in which the conditions of different business industries and trends in traffic are touched on. Our men are in contact with traffic managers and executives of business and manufacturing firms. I am also in touch with the passenger, express, mail and other departments, and keep in touch with the earning capacity of those departments.

As to the traffic and business conditions on the Great Northern during 1933, the freight represents 80% of the total earnings and is a very important factor. During the years 1918 to 1927, we handled approximately eight billion revenue net ton miles of freight each year. In 1928 and 1929, the figure ran up to ten billion. It dropped in 1930 to eight billion, 1931 six billion and in 1932 to four billion. It rose to 5,400,000,000 in 1933.

78 For the ten years ending 1927, our freight revenue averaged from $110,000,000 to $112,000,000 per year. In 1928 and 1929, it rose to $126,000,000. In 1932 it dropped to $55,000,000 and rose to $62,000,000 in 1933.

Plaintiff's Exhibit 1 shows the trend of our passenger traffic in number of passengers and revenue per passenger mile for a number of years and also shows the trend of less than carload freight merchandise.

In 1914, which was a peak year, we handled approximately 9,200,000 passengers and earned an average of 2.336c per passenger mile. In 1932, the number of passengers dropped to 845,000 odd and the revenue per passenger mile was slightly in excess of 1914. In 1933, we had a slight increase in number of passengers carried but half a cent decrease in earnings per passenger mile. In 1920 we earned twenty and a half million dollars in passenger revenue which dropped to four million dollars in 1932.

(The document marked "Plaintiff's Exhibit 1" was thereupon received in evidence, and is included herewith).

Referring to the decrease in gross revenue from $126,000,000 in 1929 to $55,000,000 in 1932, I will explain some causes which have resulted in what I consider a permanent loss of revenue. The loss which is due to the universal depression will be recovered if we return to normal business conditions such as existed in 1926 and 1927, but there are certain losses of revenue which will never return. These are due to five causes. One permanent loss is the traffic which has been taken by the Panama Canal. Another is traffic taken by trucks, buses, private automobiles and aeroplanes. Another cause of permanent loss is a diversification of farming. Another is the fixation of rates by regulatory bodies which has not only reduced the rates themselves but reduced the divisions of through rates received by the Great Northern.

79 We have also been affected to quite an extent by the construction of pipe lines which supply natural gas and reduce the movement of coal. Another factor is the increasing use of lignite coal in North Dakota and western Minnesota which supplants coal traffic from the Head of the Lakes. Our earnings on a ton of lignite are considerably less than those on coal from the Head of the Lakes.

Going into these matters more in detail, the Panama Canal moved one and a quarter million tons of intercoastal freight in both directions in 1920. For the year 1930, it moved 10,500,000 tons and for the 12 months ending June 30, 1934 approximately 9,000,000 tons. This has resulted in serious losses of transcontinental rail traffic including that of the Great Northern.

The population of the states bordering on the Pacific Ocean has increased more in the last ten years than any other section of the United States and a great many manufacturing plants formerly located in the central west have moved to California with the result that we no longer handle the transcontinental manufactured products formerly originating in the central west or east and get at most a short haul from California. A very large percentage of the movement from California is by water or truck.

As illustrating the increased movement through the Panama Canal, eastbound flour increased from 65,500 tons in 1926 to 185,000 tons in 1933. Wheat increased from 286 tons in 1926 to 92,700 tons in 1933. Wool, which formerly furnished a very good haul to the Great Northern increased from 15,000 tons through the Panama Canal in 1926 to 38,000 tons in 1933. Wood pulp manufactured on the Coast and moving to points east of Ohio has all gone to the water.

In 1926, the Canal lines handled 362 tons and in 1933
80 94,200 tons. Canned goods through the Canal increased from 450,000 tons in 1926 to 546,000 tons in 1933; smelter products in which we are particularly interested from 6,800 tons in 1926 to 54,500 in 1933; paper and paper goods from 4,048 tons in 1926 to 54,470 tons in 1933.

Some of the Panama Canal increases on westbound traffic were as follows:

Automobiles 1926, 2,600 tons, 1933, 29,800 tons. Corn 1926, 61 tons, 1933, 82,383 tons, in 1932, 116,000 tons. Lubricating oils 1926, 33,873 tons, 1933, 74,140 tons. Sulphur 1926, 97,344 tons, 1933, 122,000 tons.

This tendency of traffic away from the railroads and toward the Canal is due to steadily accelerating tendencies which are getting greater every year and we believe that it is going to continue.

The result of this trend has been that the transcontinental lines have had to make very drastic reductions in their rates in an effort to hold the traffic, so that they are not only losing a large part of their tonnage but also very seriously losing revenue on the tonnage that is left. The rate on canned goods eastbound has been reduced in five years from $1.28 a hundred pounds to 80c.

Truck competition also has not only greatly reduced the total tonnage of freight but has resulted in drastic reduction in rates on the traffic that is left. The truck registration in states traversed by the Great Northern increased from 69,808

in 1920 to 244,068 in 1932. Miles of surfaced roads in states traversed by the Great Northern increased from 24,261 in 1929 to 311,181 in 1932, and this increase has been going forward by leaps and bounds.

Trucks have affected Great Northern earnings on a number of commodities. Receipts of livestock at South St. Paul by truck increased from 34,431 truckloads in 1924 to
81 158,134 truckloads in 1933, while carloads of livestock handled by the Great Northern railroad into South St. Paul decreased from 26,210 carloads in 1925 to 12,479 carloads in 1933 or a decrease of over 50% while the truckloads increased 300% and the number of animals handled by truck increased 900%. Similar conditions exist at other stockyards points on our line such as Sioux City, Sioux Falls, Spokane, Tacoma, Seattle and West Fargo.

Our revenue on livestock has also been affected by the location of packing plants at interior points such as West Fargo, Grand Forks, Watertown, Huron, Butte and Great Falls which reduces the haul into the packing plant and makes it more susceptible to truck competition.

This same truck competition affects us with reference to other commodities such as the movement of merchandise from distributing centers and the movement of manufactured products all over our railroad, with the net result that we not only handled less tonnage but get considerably less money for what we handle.

I cannot get any exact figures on the losses due to pipe line competition but this loss is considerable.

During the last four or five years particularly, we have had a number of rate orders from the Interstate Commerce Commission which have made very drastic reductions in our rates on various commodities. An outstanding example is petroleum products. Serious reductions have also been made by the Commission in livestock rates and class rates and our division of through rates has also been reduced.

Diversification of agriculture has resulted in increased production of dairy products and livestock which are susceptible to truck competition and this has also reduced our revenues.

I undertook to determine how much of this loss in revenue from 1929 to 1932 is due to the depression or temporary causes and might be recovered in a period of prosperity and

how much is due to permanent causes and never can
82 be recovered under any conditions. This is, of course, just a matter of judgment.

With a return of normal business conditions, I estimate that our gross revenue should be approximately as follows:

On products of agriculture approximately $21,000,000 per year which is $5,400,000 under the 1921 peak and $5,000,000 over the 1932 low figure. The permanent loss is due to the diversification that I have already mentioned and government curtailment of crops, and also the processing tax which causes the farmer to haul wheat into a local mill for grinding instead of shipping to central mills. There are also heavy losses on apples and pears from the Pacific Northwest on account of Panama Canal competition and also truck competition. We have reduced rates from 30 or 35c to 22½c per cwt. in an effort to hold this traffic.

On products of animals, I estimate earnings of $3,500,000 in normal times which is a million dollars less than the 1929 peak and the same as our 1932 earnings. The reduction in the estimate from 1929 is due to truck competition, interior location of packing houses and reduction of rates by the Interstate Commerce Commission. On products of mines, I estimate $15,000,000 annual earnings in normal times which is $6,600,000 under the 1929 peak and $9,350,000 above our 1932 low spot. The reduction from the 1929 earnings is due to loss of coal traffic on account of pipe line competition and use of lignite coal. I include in my $15,000,000, $9,000,000 for iron ore. I have made this estimate after discussing future prospects with representatives of the iron and steel industry and think it is a very liberal estimate. On other products of mines, there is a growing tendency to handle smelter products by the Panama Canal, which reduces our revenue.

On products of forests, my estimate is $10,500,000 yearly which is $3,900,000 below the 1929 peak and $6,500,000 over the 1932 low spot. My reduced estimate is due to the
83 fact that our forest products come largely from the Pacific Northwest where the Panama Canal competition has been growing in leaps and bounds so that today we get practically no lumber originating at or near the Pacific Coast and destined to Atlantic Seaboard territory, or to points 150 to 200 miles back. The increase in use of substitutes such as cement and steel replacing lumber and prepared roofing replacing shingles and use of wall board is also a factor in this reduction.

On miscellaneous and manufactured products, I estimate an annual revenue after return to normal conditions of $17,500,000, which is $8,000,000 less than the 1929 peak and $4,700,000 in excess of the 1932 low spot. I have already stated the reasons for this which include Panama Canal competition, location of many factories on the Pacific Coast, truck competition, etc. This classification includes refined petroleum and gasoline which are affected by pipe line competition.

On passenger, mail, express, milk and cream traffic, switching revenue, dockage service and miscellaneous, I estimate future passenger revenue at not over $5,000,000 which is $6,300,000 less than 1929 and a million dollars more than 1932. This reduction is due to bus competition, private automobiles, aeroplanes and the lower level of passenger fares which have been established in an effort to hold traffic.

On mail, I estimate $2,800,000 annually which is $600,000 under 1929 and the same as 1932. This loss is due to our running fewer passenger trains and thereby losing mail revenue. On express traffic, I estimate $1,250,000 annually which is a million dollars under 1929 and $460,000 over 1932. This reduction is due to truck competition, curtailed passenger trains and the substitution of freight service for express service.

84 On milk and cream traffic, I estimate $200,000 annually which is $285,000 under 1929 and $67,000 under 1932. There has been a growing tendency of locating creameries in the interior and the milk moves into the creameries by truck on a relatively short rail movement and this revenue will never be regained.

On switching, I estimate $750,000 annually which is $240,000 under 1929 and $320,000 over 1932. This reduction is due to the decreased volume of freight handled.

On miscellaneous revenues, I estimate $2,500,000 annually which is $3,725,000 under 1929 and $1,160,000 over 1932.

Adding all of these figures to the estimated gross freight revenue, I estimate that the total revenue of the Great Northern Railway Company from all sources after return to normal business conditions such as existed in 1926 and 1927 would be $86,000,000 annually. I would not say that earnings would increase to this amount in one year or 5 years or 10 years or any particular time. I am merely saying that that should be our earning power if and when the United States and the world return to normal business conditions.

I think that that is about all an investor in our securities can look forward to with any reasonable degree of certainty in a period of prosperity.

As to the extent to which different topographical conditions and different construction and operating costs on different sections of the railroads have been recognized in fixing freight rates, the Interstate Commerce Commission in a number of cases have established a higher level of rates west of the North Dakota-Montana line than east of that line. In 179 ICC 571, rates on oil well supplies were 20% higher west of the line than east. In 136 ICC 337, rates on reinforced concrete pipe were made 15% higher west than east. They fix a scale to the North Dakota-Montana line and then say that the same scale will apply beyond but with the added percentage. We call this a laminated scale. They will say to use your lower scale for the full haul and then add an arbitrary amount for the haul in the higher-rated territory.

85 The Court: And just where is that fact pertinent to the tax levy in any one of the states as you view it?

My answer is that in establishing or dividing freight rates recognition must be given to the cost of transportation and investment in the territory traversed. In 203 ICC Reports 299 at 335, the Commission said: "Cost of service including the burden of carrying the necessary investment ought to be the factor of primary importance in fixing the division of joint rates". In this case, the divisions allowed by the Commission were equivalent to a mileage prorate with every mile west of the Missouri river computed at 1¼ miles. They recognized the cost of service and the heavy investment in the mountain lines, and it occurred to me that it was equally pertinent in the assignment of taxes.

In 108 ICC 605, a level of rates was established on cottonseed 15% higher in the west. In 190 ICC 611, livestock rates were made 10% higher in the western territory. In 147 ICC 581 and other cases, the Commission fixed class rates in Mountain-Pacific territory 15% higher than were fixed east of the Montana-Dakota line in 164 ICC 1. In 192 ICC 135, rates on petroleum products were made 10 to 15% higher for the Montana haul than to western North Dakota. In 179 ICC 435 and 192 ICC 599, rates on refined petroleum averaged 10% higher in the west than in the territory east.

To figure a rate under one of these laminated scales you take your through rate for the entire distance at the lowest

scale and then make additions for the portion of the haul in higher-rated territories thus constructing the entire rate.

You could illustrate this by taking 3 strips of paper of different lengths with the longest at the bottom and the shortest at the top, the ends being even at what would be the more distant or the more expensive part of the haul. They are not published that way but this is given recognition in
making the divisions. A mileage prorate of the en-
86 tire rate in such a case would result in apportioning to the lower-rated part of the haul some of the additional earnings that the Commission allowed for the more costly part of the haul. The reason for this lamination is the difference in the cost of the haul in the zone. They also consider traffic density and overhead.

If there were only one line involved, the laminated scale would be spread out over the entire distance.

As to the policy of the Great Northern in these matters, the history of our railroad or the history of any railroad in the west will show that the level of rates in the Mountain-Pacific territory has always been higher than in the prairie territory and in our prairie territory the level of rates increases as you go west from the Twin Cities getting into the more sparsely settled sections of North Dakota and Montana.

Cross-Examination.

By Mr. Sathre:

The increase in Canal tonnage from 1920 to 1932 was not uniform but wherever there was a reduction from one year to another there was a still greater decrease on the trans-continental rail lines. On the whole, there was a very decided increase in Canal tonnage during that period. During the same period, the total operating income of the Great Northern increased from $103,452,937 in 1922 to $125,932,000 in 1929, and between the same years net operating railroad revenue increased from $23,816,899 to $43,000,000 plus. That is before deduction of taxes. However, it has been largely since 1929 that we have felt more intensely the competition of the truck and have been forced to reduce rates very drastically so I think I am warranted in making estimates for the future measured by the trend since 1929. The sharp drop after 1929 and down to 1932 was due both to the economic depression and to the competition from trucks and the increase in Canal tonnage. The increased Canal tonnage from 1922 to 1929 did not reduce our total or net operating

income, but our increases might have been heavier
87 had we had the Canal tonnage which we know we lost.
All railway traffic decreased probably 50% from 1929 to 1932. We were no exception, but the transcontinental lines have suffered more than the others. The increased number of boats in the Panama Canal trade and the tendency to reduce the rates have reduced the transcontinental lines much more than they have any other line in the country. Eastern and Southern lines operating back from the Atlantic Seaboard or the Gulf get something from this Panama Canal traffic while we get nothing. In making my estimate, I assumed that this Congress or the next would give us some regulation of bus and truck traffic, and I have assumed that such regulation would restore some of the revenue which is now being lost.

In these laminated rates we show just the one through rate and not the laminations. The income statements submitted in the tax reports do not show these laminated rates nor the higher rates on traffic in the west. And no information about laminated rates was before the State Board of Equalization in fixing the tax or in making the assessment.

It is true today that transcontinental rates are fixed almost entirely upon a competitive basis with the Panama Canal and without regard to expenses of operation in various states; that is we make them as low as we can and still have some profit over and above what we estimated to be our out-of-pocket cost.

It is not true today that a large share of our interstate business is transcontinental. It is gradually disappearing. There has been a steady decline since even back of 1929, but it has been much heavier in the last five or six years due to the additional boats and the rate reductions.

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88 OSCAR S. BOWEN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Dorety:

My name is Oscar S. Bowen. I reside in St. Paul and am Assistant to the Chief Engineer of the Great Northern Railway. I have charge of their valuation.

I have had a total engineering experience in railroad work of 40 years including 7 years before I came with the Great Northern. I was office engineer at Spokane for 2 years and district engineer in charge of all work on 2 divisions for 10

years. I was then made Assistant Chief Engineer and had charge of all work on the system from Williston west for 12 years. Since 1925, I have had charge of valuation work. Prior to 1925, I was the highest engineering officer of the company on the lines west of Williston. I have had charge of considerable construction work.

In my present position, I have charge of all the work that is done by the company in connection with the Interstate Commerce Commission valuations and keeping them up to date and the valuation records are all in my custody.

Plaintiff's Exhibit 2 is a correct map of the Great Northern Railway Company as shown by the red lines.

(The document marked "Plaintiff's Exhibit 2" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 2).

61.7% of the Great Northern lines in North Dakota are classified by the Interstate Commerce Commission as branch lines. On the balance of the system in the United States the branch line percentage is 43.5%. So that there is a very much larger percentage of branch line mileage in North Dakota than on the balance of the system. In general the gridiron lines running north and south on the map are all branch lines.

89 The Great Northern lines in North Dakota are of very materially lighter construction and are very materially less expensive than those on the balance of the system, first, because the topography in North Dakota lends to cheaper construction than in any other state along the Great Northern, and second, because such a large percentage of the lines in North Dakota are branch line construction permitting of steeper grades, more curvature and lighter steel and bridges.

The topography in North Dakota is comparatively level. Minnesota is more rolling and has a number of water courses to cross. North Dakota is more level and has fewer water crossings. In Montana, the construction is very expensive on account of crossing the Rocky Mountains. In Idaho we follow the Kootenai river making construction heavy. In Washington we have the Cascades making the construction in that state exceedingly heavy. Also the crossing of the Columbia river which is rather an expensive part of the line. We have a very small mileage in Oregon and California which is not very heavy construction.

Plaintiff's Exhibit 3 is a correct comparison of the number of units of various classes of physical property constituting the railroad for each mile in North Dakota and on the balance of the system. The total grading in North Dakota is 27,974 yards per mile against 47,044 yards per mile on the remainder of the system. There is only 59.5% as much grading per mile in North Dakota. The percentage of North Dakota to the balance of the system in the different classifications of grading per mile is, common material 72%, hard pan 1.7%, loose rock 82½%, solid rock 4%. The tunnels in North Dakota per mile of road only amount to 4.6% as much as on the balance of the line in lineal feet per mile of road.

North Dakota has 44.6% as many pounds of steel in
90 bridges per mile of road, 50.2% as much timber and 46% as much concrete and 80.5% as much rail and 63.9% as many signals. There are no snowsheds in North Dakota.

(The document marked "Plaintiff's Exhibit 3" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 3).

The fact that even the rails in North Dakota are lighter per mile is accounted for by the larger percentage of branch lines in North Dakota which are constructed generally with rail weighing from 66 to 70 pounds per yard, while the main line of the system in general will run from 90 to 130 pounds per yard. There is no 130 pound rail in North Dakota. The main line in North Dakota will run generally from 90 to 100 pounds per yard. There may be a little 110 pound. In the heavier grade sections on the balance of the system, we have considerable portion of 130 pound rail.

North Dakota has no large car and engine repair shops. They have nothing but small shops capable of making light repairs. The largest and principal shops of the system are located at Superior, the Twin Cities and on Puget Sound. In addition there are quite large engine and car shops in Minnesota, Montana and Washington but none in the State of North Dakota.

There are not as many stations per mile of line in North Dakota as on the balance of the system. In North Dakota there is one station to every 5.668 miles of railway and for the balance of the system, there is one station to every 4.826 miles.

Plaintiff's Exhibit 4 is correct and shows the cost of reproduction less depreciation as found by the Interstate Commerce Commission, plus the net additions and betterments

since that date for some of the larger Great Northern terminals. The Great Northern Railway has terminals on Lake Superior and at the Twin Cities and on Puget Sound
91 out of proportion to the terminals on any other part of the system. These are the terminals that I have shown in Exhibit 4. They have a reproduction cost less depreciation of nearly $69,000,000 which is between 12 and 13% of the total reproduction cost less depreciation of the entire system. As measured by cost that would indicate that between 12 and 13% of the physical properties making up the railroad are located in these terminals. These terminals include 53 miles of road, 10 miles on Lake Superior, 26 miles in the Twin Cities and 17 miles on Puget Sound. In the mileage in the Twin Cities, 8 miles are in St. Paul and 18 miles in Minneapolis. The total value of these terminals divided by the miles of road that they contain gives a value of about $1,300,000 per mile of road.

(The document marked "Plaintiff's Exhibit 4" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 4).

Besides these three larger terminals shown in Exhibit 4, there are about 23 secondary terminals of considerable size scattered along the line both inside and outside of North Dakota. Plaintiff's Exhibit 5 is correct and gives a list of these terminals. There is one terminal for every 383 miles in North Dakota and one terminal for every 330 miles on the balance of the system. The terminals inside North Dakota would compare pretty well with those outside North Dakota as to size and value although we have three terminals outside North Dakota that are very much larger than anything in North Dakota. These three outside the state include very large engine and car shops and might tend to make the general average a little larger outside the state, but I do not think there would be much difference. These three larger terminals that I have just referred to are among those shown on Exhibit 5 and not those shown on Exhibit 4. They include St. Cloud, Minn., Great Falls, Mont., and Hillyard, Wash. Exhibit 6 correctly shows the percentage of main and branch line mileage on the Great Northern system by states.

(The documents marked "Plaintiff's Exhibit 5" and
92 "Plaintiff's Exhibit 6" were offered and received in evidence and are included herewith as Plaintiff's Exhibit 5 and Plaintiff's Exhibit 6).

Exhibit 7 correctly shows the cost of reproduction less depreciation per mile of the Great Northern system by states, including all of these various shops, terminals, stations and

other things that I have referred to. This statement shows that the balance of the system outside of North Dakota has a cost per mile 196% of that in North Dakota, and including the lines in Canada 198% of the cost in North Dakota. In other words, the cost per mile outside of North Dakota is almost twice that in North Dakota.

(The document marked "Plaintiff's Exhibit 7" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 7).

As to whether the construction by the Great Northern Railway Company of additional property outside North Dakota has ever reduced the miles of road outside the state and thereby increased the percent of total miles in North Dakota, I will say that in the State of Washington we first operated over the summit of the Cascades. We later built a tunnel about 2-3/4 miles long reducing the length of the line by 9 miles. At a considerably later date, we constructed a longer tunnel about 8 miles long, reducing the length of the line an additional 8 miles. About that same time we made a line revision west of Leavenworth reducing the length of the line about 1 mile making an aggregate reduction of 18 miles in that vicinity. There are numerous other places on the railroad where we have made smaller reductions of from 1/4 mile to a mile, but this the largest reduction in one location that I have in mind. The total cost of the first three reductions in mileage that I mentioned was about $22,000,000. These reductions had the effect of very much reducing operating expenses and would have the effect of increasing the system net railway operating income and they also increase the percentage of miles of road in North Dakota to those on the system. If miles of road were used as a means of allocating system value, the net result of creating several
93 million dollars worth of additional property in the State of Washington would be to allocate a higher percentage of a higher system value to North Dakota. I think it would be possible for the Great Northern to operate over the Cascade mountains on a 1% grade without using any tunnel, but it would require a line between 80 and 100 miles longer than the present line which is 49 miles from Leavenworth to Skykomish. The road over the top between these points would be approximately three times as long as the present line through the tunnel and a movement over the top of the mountain on such a grade between those points would require three times as many locomotive miles, car miles, ton miles and passenger miles as is required on the present line through the tunnel. The effect of the construc-

tion through the tunnel instead of over the summit is that the percentage of car and locomotive miles and ton and passenger miles operated in North Dakota is increased.

Cross-Examination.

By Mr. Shaft:

In all of these exhibits, I have been discussing miles of road and not miles of all track. I cannot give the number of miles of all track in the terminals listed in Exhibits 4 and 5. When I said there were 18 miles of road in the terminals at Minneapolis and St. Paul that is the distance from the outside limit of the terminal in Minneapolis to the outside limit of the terminal in St. Paul and is the amount of main line operated over. There are a great many other side-tracks and switching tracks in those terminals. If you took all tracks into consideration, the difference between North Dakota and the balance of the system, the number of miles per terminal would probably not be so great. In the great terminals there may be 20 or 30 times as much track as there are miles of road.

94 When I said that the cost of construction per mile of road was twice as great outside of North Dakota as inside, I was referring again to miles of road and not miles of track.

One of the chief purposes of the construction of the tunnel out west was the elimination of snow-sheds. This snow-shed construction has been charged off of our books in our valuation of the railroad, at the completion of the long tunnel. The Great Northern owns its own passenger depot in Minneapolis and has stock in the St. Paul Union Depot Company in St. Paul and own our own freight depot in St. Paul. The only station out west in which we are part owner is in Seattle where we own half of the station. In my valuation of these terminals, I have included only our ownership.

My figures representing miles of road do not include miles owned by other companies over which we operate by trackage rights or which are leased. It includes only what are both owned and used.

Redirect Examination.

By Mr. Dorety:

If in a certain terminal there are 10 miles of road and 20 times as much of all tracks, a locomotive bringing a shipment into that kind of a terminal would move 10 miles, I presume. Locomotive mileage would be measured by miles of road and not by miles of track, and the same would be true

of car miles on cars coming into the terminal and on ton miles and passenger miles. If interstate revenue were allocated in proportion to miles of haul, it would be miles of road rather than miles of all track that would enter into that computation.

95 Recross Examination.

By Mr. Shaft:

The reason for that is that much traffic comes into these terminals from other states so that many tracks side-by-side are required and each train as it comes in is not required to wait for another train to get out but they can all come in there side-by-side.

Mr. W. L. Schoettler, a witness called on behalf of the plaintiff, testified as follows:

Direct Examination.

By Mr. Dorety:

My name is W. L. Schoettler. I reside in Ramsey County, Minnesota and am Assistant Right of Way, Land and Tax Commissioner for the Great Northern Railway Company. I have been with the Great Northern Railway Company for something over 27 years and have held my present position since 1925. I handle all of the reports to taxing officials and attend hearings before tax commissions, state and county boards of equalization, budget hearings and all matters connected with ad valorem taxes on the Great Northern Railway and its subsidiary companies. It has been part of my duty for many years to appear before public taxing authorities along the system to discuss assessments and valuation of the various properties, both of the railroad and the physical property of subsidiary companies whose stocks and bonds are owned by the Great Northern.

There would not be more than 10% difference between the percentage of Great Northern miles of road in North Dakota to the balance of the system and the percentage in miles of all track. If 22% of the miles of road are in North Dakota, the all track mileage percent would be about 20.

Plaintiff's Exhibit 8 is a correct statement of some of the securities of other companies and of other assets owned
96 by the Great Northern Railway Company in 1933 but which were not used as a part of its operating system. I have attempted in this statement to make an appraisal of the value of these securities and other assets. Where the securities had earned any income, I took an average of the

income to the Great Northern Railway Company for a five-year period, in dividends or interest and capitalized it at the rate of 6%. I used a five-year earnings because it has been the general custom in North Dakota to use a five-year period in obtaining an average market value of stocks and bonds. I used the rate of 6% because that has been used as the rate for capitalizing the income of the railway company in determining value. If I were determining the proportion of total value which should be allocated on the one hand to railroad property and on the other to non-operating property, and were determining it by capitalization of the respective earnings, I would use the same number of years and the same rate per cent whatever it would be on both sides.

(The document marked "Plaintiff's Exhibit 8" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 8).

There are some assets shown on Exhibit 8 other than income producing securities. We have some real estate and land grant lands which have some value, although they are not producing income. They have a sales value. In appraising such property, I have put down the assessed value for 1933.

The land grant lands shown in item No. 10 on Exhibit 8, are appraised at an estimated value which I think is very conservative. We own 115,000 acres located principally in Minnesota and appraised them at about $9 an acre. Some of these lands have sold for $20 an acre or better and some of the recent sales have been approximately $9 an acre. Referring to the stock of the Chicago, Burlington & Quincy Railroad Company which is listed in Exhibit 8, I determined the value of that by capitalizing the actual dividends paid to the Great Northern Railway Company, although the earnings of the Chicago, Burlington & Quincy Railroad during the five-year period exceeded the dividends that they paid.

97 Exhibit 9 is a statement showing the assessed value of our railroad property by states and also the percentage that the assessed value bears to the reproduction cost less depreciation of the property in each state. These figures are correct. On this statement in the column under "Assessed Valuation", I have shown the full assessed valuation for each state as fixed by the Central Taxing Board on the operating property of the railroad only, although in some states this full assessed valuation is reduced for assessment purposes before levy of taxes. This statement shows that in 1932 North Dakota assessed our property at 101.02% of

the then reproduction cost while the average assessments in other states were 57.06% of the cost of reproduction. In 1933, the North Dakota assessment was 100.82% of reproduction costs while the other states were 52.32%. In other states, our assessed valuation for 1933 was less than for 1932, the decrease running from 5 to 20%, while in North Dakota there was no decrease except about 2/100 of 1% which was due to the removal of some trackage. The rate per mile in North Dakota for 1933 was identically the same as for 1932, and North Dakota was the only state on the system which failed to recognize that there had been a decrease in value of railroad properties since 1932.

(The document marked "Plaintiff's Exhibit 9" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 9).

The amount of the total tax levied in North Dakota and the amount apportioned to each county as shown in paragraph 7 of the complaint in this case is correct, and this paragraph also correctly shows how the assessed valuation was distributed between the counties and the amount of tax levied thereon by each county.

Referring to paragraph 25 of the complaint tendering the payment of 60% of the tax levied, I will state that the payment of the 60% was completed in all of the counties, and we have the official tax receipts for the payment of the 60%.

98 Plaintiff's Exhibit 10 is a correct comparison of the assessment of Great Northern property in North Dakota with that of other railroads. It shows that the assessment against the Great Northern Railway Company is higher per mile than that against any of the other railroad companies, although the Great Northern has a little larger percentage of branch lines to total mileage in North Dakota than any of the other three roads. And on percent of assessment to reproduction cost it is also substantially higher than the assessment of any other railroad.

(The document marked "Plaintiff's Exhibit 10" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 10).

As to whether the taxing authorities in North Dakota have given any effect to depression or panic prices since 1930 in assessing other properties, there has been a reduction in the assessment of farm lands and also in the assessment of railroads of other companies. In the case of farm lands, there

was a 10% reduction in 1932 and there had been a reduction of about 15% a year or two earlier making a total reduction of about 25%. In 1932, other railroads were given reductions of 5 and 10% and the Great Northern was not given any.

Cross-Examination.

By Mr. Shaft:

It is true that in 1931 the Great Northern assessment was reduced 35/100 of 1% but the other railroads in the state were reduced from 4 to 8%. In 1932, there was a 5% reduction in the Great Northern assessment for valuation, but the other railroads were decreased from 10 to 15%. These reductions tended to bring the other railroads nearer to some computations which had been made by the Tax Commission upon the basis that has been followed for some time in North Dakota. There are some methods which have been quite generally used in the different states, but the assessment has usually been modified to fit the particular conditions existing upon each railroad and the assessment announced is
99 not generally the exact result of any computation. These computations and formulae are of more or less arbitrary nature. We are attempting to arrive at market value of something that is not bought and sold by various formulae. Computations are made to set up limits between which values are to be found, and the Great Northern Railway with other railroads has made use of these formulae before the North Dakota Tax Commission. These formulae embody methods for allocating railroad values to various states and the Great Northern has used such formulae before the North Dakota Board of Equalization. We have called the Board's attention to the fact that the cost of reproduction was set up in the report as requested by the Tax Commissioner, and we have at times set out the exact ratio on cost of reproduction that North Dakota would be entitled to have of system value. On other occasions we have entirely eliminated cost of reproduction. There was a time in the past when the report to the Tax Commissioner did not ask for cost figures and since that time we have supplied the information, but I do not recall that we have always made specific mention of it when appearing before the State Board of Equalization. Cost of reproduction is one of the factors that should be considered although maybe not the most important one.

The only item in Exhibit 8 where I used an estimated value based on anything but the assessed or the capitalized value is item No. 19 land-grant lands which are not locally assessed by the terms of the grant. The purpose of valuing the non-

operating property in this exhibit is to make a deduction from the stock and bond value of the entire Great Northern property. The stock and bond value of the Great Northern represents both operating and non-operating property and it is necessary to eliminate the non-operating property as otherwise there would be a double assessment of the same property.

100 In capitalizing railroad income at 6% in order to determine system value, we include income which is applicable to bond interest as well as to dividends on stock. It is the net railway operating income. The 6% is just about a good return as near as I would say. If it were to be a return to the investors it would probably be something different than 6%. When we capitalized the net earnings at 6%, we are capitalizing all of the earnings available for the payment of bonds as well as dividends. As to whether bondholders are willing to accept four or five per cent on the investment, that depends upon the company. The Great Northern series A bond has a rate of 7% and is selling below par. Stock purchasers require a much higher rate of dividends than bondholders. I should judge that an investor in Great Northern stock today would want at least 10 or 15%.

In capitalizing the earnings of stocks and bonds owned by the railroad in Exhibit 8, I have used 6% regardless of whether it is stock or bonds. The largest single item of non-operating property owned by the railroad is the C. B. & Q. stock which includes about 48 or 49% of all the common stock of the C. B. & Q. The Northern Pacific Railway owns the same amount as the Great Northern. The Burlington has an independent operation. I capitalized the dividends paid to the Great Northern at 6%. I did not consider whether the ordinary investor in stock would require a much higher rate of return and made no study of each individual security as to that. This stock has no open market. I do not think it is fair to use a much higher rate of interest than 6%. The Burlington has some outstanding bonds which would come ahead of the common stock. I cannot say what return they bring.

101 The Great Northern Series A bonds were issued in connection with the refinancing of the old NP-GN-CB&Q Joint Collateral Trust bonds. Those bonds are selling a little less than par and pay 7%.

As to whether the earnings on the stock should be capitalized at a higher figure than 6%, I think that if you were capitalizing the net railway operating income to determine value at a higher rate, perhaps a higher rate of interest should

be used on these securities. I think it is generally true that ordinary purchasers of stock require a higher return on the money than purchasers of bonds, but I have made no attempt to capitalize earnings on stocks at a higher return than 6%. The largest item of our non-operating property are stocks and bonds because of the Burlington stock and most of the other items on Exhibit 8 consist entirely of stock, but I have used 6% throughout.

In the case of Item 10 on Exhibit 8, which is the stocks and bonds of the Spokane, Portland & Seattle Railway Company, I have used the assessed values of those properties, but I did not include the assessed valuation of the locally assessed properties which is considerable but only the operating property. We own one-half of that and the Northern Pacific owns the other half. I made no attempt to compute what that property would be worth by capitalizing its earnings at 6%. The bonds have paid some interest, but I do not know just how much. The stock has not paid any dividends recently. If I capitalized the income from this particular investment it would probably produce a figure much less than the assessed valuation, but I could not say to what extent. The assessed valuation of the S. P. & S. properties has been much reduced in recent years partly by action of the court. I think that the S. P. & S. has kept up its interest payments,
but I am not positive as to that. I have not the records
102 with me. I do not know whether it skipped 1930 or not.
As to Item No. 5 on Exhibit 8, the Dakota & Great Northern Townsite Company, that Company holds a lot of property for sale and future development. I have taken the assessed valuation of the property standing of record in the name of the Townsite Company and have made no effort to capitalize its earnings.

Referring to Exhibit 9, I think that some years ago in Idaho some of the assessors stated that property was assessed at about 50% but for the last two years, the assessors have maintained that they assess at a full 100% and in some cases more than 100%.

Referring to the Great Northern assessment shown in Exhibit 10, I assume that the State Board had something on which to base their value, but the assessment is greatly in excess of the computed values submitted to the State Board. I rather think that the net operating income is higher for the Great Northern than the other roads as we have had very low operating expenses. I think that our operating ratio was lower than the other railroads.

At the meeting of the State Board of Equalization at which the 1933 taxes of the Great Northern Railway were considered, I was present and filed a brief setting forth the stock and bond values of the Great Northern Railway for the 5 years prior to November 1, 1932, and also the deduction of the non-operating assets and also a valuation of the system by capitalizing the net railway income at 6%, and I then took a straight average of these two values and then allocated the value of the entire system to North Dakota by four factors and also three factors. The four factors were the mileage of all tracks, car and locomotive mileage, revenue and traffic units and gross operating revenues. We also called attention to results that would be obtained by using other factors and that the physical property ratio was less than the ratios set forth in the tabulation. I do not recall any other
103 factor that was used.

Redirect Examination.

By Mr. Dorety:

The Spokane, Portland & Seattle Railway Company is a jointly-owned property and has considerable physical property and undoubtedly brings traffic to the two owning companies.

The Great Northern owns additional non-operating assets other than what are listed on Exhibit 8. There are some million dollars or more book value that is not included in this estimate. I have not attempted to make a complete list but just took the principal assets.

I know of no case in my experience where an assessed valuation in any state was the exact result of any mathematical computation and formula. The use of the formulae varies in different states and the assessment is usually different from the computations. When I say that a certain formula is used in a particular state, I mean that the statisticians have usually set out a number of computed values which are averaged and sometimes the assessment is entirely different from any of them.

If the method which is advocated by the defendant in its answer in this case were applied in the State of Washington, such a computation would produce a value considerably less than the present assessed valuation. The assessments actually being made in Washington exceed such a computation by 30 or 35%. They give considerable weight to cost of reproduction.

Recross Examination.

By Mr. Shaft:

These formulae are attempts to find and estimate a value for the operating property and are useful in fixing the assessment. So far as I have been able to discover, no method has yet been developed which can in an exact scientific manner fix the true value of the state's share of an interstate railway. In each case all the surrounding facts and circumstances, the conditions and the times and all that sort
104 of thing have to be taken into consideration in order to arrive at a reasonable approximation of true value, as well as the peculiar conditions of each road.

Whereupon it was stipulated between the parties that in an action brought by Minneapolis, St. Paul & Sault Ste. Marie Railway Company contesting the assessment of the operating property of that company in North Dakota for 1933, the assessment was reduced by agreement of the parties, after the 1932 assessment against the same property had been declared invalid by the court.

Oscar S. Bowen was recalled as a witness on behalf of the plaintiff and testified as follows:

Direct Examination.

By Mr. Dorety:

Referring to the three larger terminals at the Twin Cities, Superior and Puget Sound shown in my exhibit 4, I find that there are 158 miles of all track in the Superior-Allouez terminals, 266 miles of all track in the St. Paul-Minneapolis terminals, and 113 miles of all track in the Delta-Everett and Seattle terminals, a total of 537 miles of all tracks as compared with 53 miles of single main line or about 10 times as many miles of all track as of road miles. The reproduction cost less depreciation in these terminals per mile of all track is $114,000 at Superior-Allouez, $120,000 at St. Paul-Minneapolis and $166,000 at Delta-Everett and Seattle, the average for all being $128,000 per mile of all track. Averaging sidetracks, loading tracks, house tracks and everything else in these larger terminals, including main lines the average value per mile is a little over three times as much as the average mile in North Dakota.

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105 V. P. Turnburke, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Dorety:

My name is V. P. Turnburke. I reside in St. Paul and am General Auditor of the Great Northern Railway Company. I am a graduate civil engineer and have been engaged in rail road engineering for 4 years and in statistical work for the past 18 years. I have been statistician for the C. M. & St. P. Ry. Co. and the Great Northern Railway Company, and during the War was manager of the Operating Statistics Section of the United States Railroad Administration at Washington. As General Auditor of the company, I have in my custody all of the various records and books of the company and have had general supervision of reports made to the various state railroad commissions and the Interstate Commerce Commission.

When the North Dakota tax authorities used the proportion of gross revenue in North Dakota to that on the system as one of the five factors of allocating system value to the State, they get the gross revenue for North Dakota by taking a mileage prorate of the interstate freight revenue on each interstate shipment moving in any part in North Dakota and add to that the total intrastate revenues in North Dakota.

The Great Northern Series A 7% bonds referred to in Mr. Schoettler's testimony are secured by pledge of the Burlington stock owned by the Great Northern, which is pledged to secure all General Mortgage Bonds of the Great Northern amounting to about $200,000,000. These Series A bonds are likewise secured by the physical railway system of the Great Northern which underlies all of the General Mortgage Bonds.

106 Referring again to the matter of allocating interstate revenue which I was speaking of, when a freight rate on interstate traffic is made on a laminated scale as described by Mr. Beidelman, the total revenue is prorated to North Dakota on a mileage prorate basis including a mileage prorate of both the underlying rate and the overlying or laminated rate at the higher figure. The entire revenue is prorated in that case on a mileage basis just as it is in every other interstate shipment.

I have prepared plaintiff's Exhibit 11 in order to show how in my judgment the total revenue on that kind of a shipment should be allocated in proportion to cost of service and also how it is allocated on the mileage basis. This shows a shipment moving through the States of Washington, Idaho, Montana, North Dakota and Minnesota, and I have assumed

it to be a shipment moving under a laminated rate scale to which the additional layers of revenue have been added in the states of higher cost, so that the total revenue is just sufficient to pay the total operating expenses plus an allowance for the use of property, which I have assumed to be 4%. This Exhibit 11 applies to a 30 ton shipment as an example, and in column 1 is given the approximate miles hauled in each state. Column 2 shows net ton miles and is the product of the 30 ton shipment times the miles in each state as shown by column 1. Column 3 shows the operating cost per hundred net ton miles, and column 4 shows the allowance for use of property at 4%. The operating costs shown in column 3 are round figures but are approximately correct, as is the allowance for use of property in column 4, the 4% being applied to the actual value of the property in these states.

Column 5 shows the total operating expenses for the entire shipment and is obtained by multiplying the ton
107 mile cost in column 3 by the ton miles in column 2. Column 6 is a similar procedure for the use of the property. The total cost for handling the car including the allowance for the use of the property is shown in column 7 which is the sum of the two previous columns. Out of a total cost in column 7 of $480, the cost applicable to each state is shown.

Now if the mileage prorate basis of dividing this through revenue of 80c a hundred or $16 a ton, which produces a revenue of $480 for the shipment, were used, 4/18 of the total revenue would be assigned to Washington which is the ratio of the Washington miles hauled in column 1 to the total miles hauled. A mileage prorate for all of the states is shown in Column 8. This gives North Dakota the same allotment of revenue as Washington although the cost of the service in North Dakota is just half the cost of Washington. Column 9 shows that the amount of revenue assigned to Washington on a mileage prorate is less than the actual operating expenses so that the mileage prorate basis says in effect that Washington should not be assigned enough revenue to pay its operating expenses and that North Dakota should be allowed a sum sufficient to pay its operating expenses and a return of 7.8% on the property used. Minnesota would receive a return of 9.7% although the total shipment produces a return of only 4% for the entire movement. Now this is exactly the situation that exists when the interstate revenues are assigned to the states on the basis of the mileage prorate and in our returns to the State of Washington, the

assignment of revenues on that basis in the aggregate on all business is not sufficient to pay the operating expenses incurred in that state, although there was actually net money made on the system operation.

If this method of allocating interstate revenue in proportion to the cost of producing the service were to be used in tax cases, I would not say that it would be necessary
108 to go through the same process which I have gone through here as to every individual interstate shipment. The same result can be accomplished substantially much more easily by making the same kind of a computation on the interstate traffic of the state as a whole instead of determining the ton miles per state on each shipment and multiplying them by the cost as I have done in Exhibit 11. It would be easier and more practical and substantially as accurate to take the total ton miles of all interstate freight traffic moving in the State, which is already shown in our public reports, and multiply that figure by the average cost. This would show the total cost for each State incurred in the movement of all the interstate freight traffic and the total interstate freight revenue on the same traffic for the system could then be apportioned to the different States in proportion to the total cost incurred in each State for producing this service.

By working it out on the basis of the total ton miles in each state as I have just described it I would not get identically the same result for each state to the last dollar and cent that I would get by allocating each individual movement separately, but it would be the same if the revenue for each shipment bore the same relationship to the cost of each shipment. This, of course, is not so as to every shipment as some rates are higher in proportion to cost than are others. However, it is generally true as pointed out by Mr. Beidelman that it has been the policy of both the company and the Interstate Commerce Commission to increase rates in the higher cost territory in order to cover the increased cost and while there may be individual rates that are higher or lower than others in proportion to the net or in proportion to the cost, thus giving a different net, I believe that when you take the total traffic of all kinds passing through any one State we will find that the total revenue bears about the same relationship to the total cost in all cases. And to the extent that that
109 is true, my short-cut method of taking the total ton miles in the state would produce exactly the same result as allocating each shipment individually, and that is particularly true of the State of North Dakota, which par-

ticipates in practically every kind of interstate shipment of this system. It is a State that is intermediate between our terminals The lumber business, the apple business, the manufactures, grain business, all of our heavy revenue producing commodities, not meaning each shipment but the general commodity movements, of the Great Northern, pass through the State of North Dakota, and the only commodity that I know of that moves in any substantial volume that does not move through North Dakota is the iron ore on our Mesabi division and to certain extents the heavy coal movement between the head of the Lakes and Minnesota points, although there is coal movement into North Dakota.

This class of traffic that does not move into North Dakota like the ore and the coal is in general more profitable than the other traffic on the system, and including that traffic and the revenue therefrom in the interstate revenue and traffic for the system simply increases the allowance that goes to the State of North Dakota on that basis.

I determine that the traffic on the Mesabi division is more profitable than on the system because by computing the system figures, eliminating the Mesabi division entirely, both its revenue and its expenses, it will be found that a smaller assignment of revenue would be made to North Dakota than on the basis of including the entire system operation including that division. It is correct to say that, to the extent that a general allocation by total ton miles in each state would vary from the separate computation of each individual shipment, the result in North Dakota would be favorable rather than unfavorable to North Dakota.

110 (The document marked "Plaintiff's Exhibit 11" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 11).

I have made a computation of the interstate revenue that should be credited to North Dakota, if it were allocated in proportion to the cost of the service by using the general method that I have just described. This computation appears in plaintiff's Exhibit 12. Page 2 of this exhibit shows the division of interstate freight revenue on a basis of cost. This is marked Schedule B.

This page, Schedule B of the exhibit, relates to freight operation, the upper half is for the years 1928, 1929 and 1930 and the lower part for 1931 and 1932, with an explanation of the source of each of the items. I might here explain that there are certain other work sheets that are re-

ferred to as Schedule C, for example, that have been furnished the State day before yesterday and that are merely working sheets on which some of the basic data is put together to bring forward on this Schedule B.

For each year there are three columns of figures, the first representing the system, the second North Dakota and the third the balance of the system excluding North Dakota, which is the difference between column 1 and 2. The freight operating expenses shown on the first line are those reported in the annual report to the Railroad Commissioners of North Dakota. The matter of equipment, freight proportion, and the joint facility rents, freight proportion, is the payments made by the company for the use of the property of others, the system figures being reported to the Railroad Commissioners of North Dakota and the North Dakota proportion being obtained on the relationship of the relative freight car miles made in North Dakota as compared with those of the system. In the case of passenger equipment on the basis of the relative passenger train car miles; in the case of the locomotives on the basis of the locomotive miles and
111 in the case of the other equipment, mostly work equipment, on the basis of the work service train miles. All of these car miles, locomotive mile and train mile figures are reported in the annual report to the Railroad Commissioners of North Dakota for both North Dakota and the system. The rents from locomotives and from work equipment must be divided between freight and passenger and that is accomplished on the basis of the operating expenses, relative operating expenses, the freight proportion and the passenger proportion, all of that is done on Schedules C, D and E, which as I say are part of the working papers, but have been furnished the State two days ago. In the case of the joint facility rents the amount shown to North Dakota is a credit and that is a collection that the Great Northern makes for the joint use of some of its property in North Dakota by other carriers, whereas for the system it is a debit. Now a word about line 4, the allowance for use of property based on the I. C. C.'s cost of reproduction new, less depreciation, plus additions and betterments since valuation date, freight proportion. In the report to the State Tax Commissioners there is shown the I. C. C. cost of reproduction new, less depreciation, plus additions and betterments, since valuation date, for both the State of North Dakota and the system, with the single exception of the year 1932, in which case all the basic information was supplied but the computation of the depreciation on equipment in North Dakota was not made, but than can very

readily be made. As to the rate of return which I have used, in each year I have used that rate of return which the system actually earned during the year and not an arbitrary 5¾% or 6% or any other per cent, but have allowed for the use of property for both the system and North Dakota the same rate of return as was actually earned during the year in question from the operations of our property.

112 When I speak of the amount actually earned, that is before payment of taxes, I have left out the taxes from this Exhibit 12 on the grounds that we are trying to determine a fair allowance for taxes and if our claim is correct that the taxes in North Dakota are over stated, then including taxes would give North Dakota disadvantage, so by leaving the taxes out a more favorable result is obtained for the State of North Dakota. Now having determined the allowance for the use of property, that allowance was divided between freight and passenger on the basis of the relative freight and passenger operating expenses in both North Dakota and for the system. That basis of division is one generally recognized, and the Courts have held that a division should be made on the basis of use of the property and it has been determined by those familiar with this kind of work that the operating expenses are the best measure of the use, the more dollars being spent in freight service is evidence that more use is being made of the joint property for the benefit of the freight service, so that the figures on Schedule B, Sheet 2 of Exhibit 12, all relate only to the freight operation. Now having totaled on line 5 the first four items, that is, the freight operating expenses, equipment and joint facility rents and the allowance for the use of property, the average cost per 1000 revenue net ton miles, Line 7, is determined by dividing line 5, the total cost, by the revenue net ton miles, which are shown in line 6 and are contained in the annual report to the Railroad Commissioners of North Dakota for both North Dakota and the system. The average costs are shown on line 7 and the interstate revenue net ton miles, line 8, is then multiplied by the cost per 1000 revenue net ton miles, line 7, to determine the cost of handling interstate traffic, line 9. The difference between the interstate revenue net ton miles and the total net ton miles, that is line 8 and line 6, is represented by the intrastate net ton miles.

113 The total cost of handling interstate traffic, both in North Dakota and out of North Dakota, is thus developed on line 9, and line 10, which shows the interstate freight revenue for the system is divided between North Dakota and the balance of the system on the relative basis of the cost of handling the interstate traffic, line 9, all of which

is shown on line 11 of page 2, Exhibit 12. This division of interstate freight revenue on the basis of cost assigns to North Dakota about twelve or thirteen per cent less revenue than the total revenue assigned to that State if the interstate revenue were divided on a mileage prorate.

My computation of the total cost to North Dakota of handling all the interstate freight that passed into or through that state is shown in line 9, column 2 as $14,190,493. The total amount of the interstate freight revenue that I allocate to North Dakota in proportion to that cost is shown in Item 11, Column 3 as $14,338,757. This last figure is the objective of my whole computation and it includes full allowance for the operating expenses and the use of the property.

Now having found for the year 1928 that North Dakota earned $14,338,757 in interstate freight traffic, that figure is brought over to page 1 of Exhibit 12, Schedule A, and added to the intrastate freight revenue as reported to the Railroad Commissioners of North Dakota and all other operating revenues, that is passenger, mail, express and so forth, both intra and interstate as reported in the annual report to the Railroad Commissioners of North Dakota, to produce the total operating revenues, item 1 C, assignable to North Dakota, which for the year 1928 was $19,613,435.00.

In the line numbered with an Arabic 2 under a Roman I, which is the second line of figures under the year 1928, "Interstate Apportioned on Cost Basis" is that same figure $14,-
338,757 which is the figure that I developed on page 2
114 and then took over to page 1. All the figures on line 2 of page 1 are developed in line 11 on page 2.

Now after having developed on line I C the total operating revenues in North Dakota for each year, I then subtract from the total operating revenues the total operating expenses in North Dakota as reported in the annual report to the Railroad Commissioners of North Dakota to obtain item 3, the net revenue from railway operations. From this latter figure is deducted a small amount for the uncollectible railway revenue proportion belonging to North Dakota, an allowance for equipment rents and added thereto is an allowance for the joint facility credits divided to North Dakota on the basis of the freight car, passenger car and locomotive miles and so forth that I have previously explained. Those figures are total for both freight and passenger, to obtain the item 8, the net railway operating income excluding taxes assignable to North Dakota. Item 8 corresponds exactly with the net railway operating income, which is the measure of the net rev-

enue resulting from the railway operations and has been used as the basis in measuring the fair return by statute and has been used as a measure of the rental to be paid to the carriers for the use of their property during Federal control, with a single exception, that item 8 does not include a deduction for taxes, which, of course, must come out of this net before the actual net operating railway income is obtained. However, I take the system net operating income, line 9, which includes a deduction for taxes and add back the railway tax accruals to obtain line 11, which is the net operating income for the system, excluding taxes, that is on the basis of the same items as is included in item 8 for North Dakota, and the last item of page 1 of Exhibit 12 shows the percent of the system net operating income, excluding taxes, that is
115 earned in North Dakota with the interstate revenue apportioned on a cost basis. This per cent varies from 11.37, the low in 1931, to 12.82 in 1928, with an average of 12.22 for the five years and 11.71 for the three years, all of which is shown on the last line of page 1 of Exhibit 12.

All of the revenue and expense figures on page 1 of Exhibit 12 are taken from reports either to the state commissions or the Interstate Commerce Commission, except that one figure of interstate freight revenue which I developed on Sheet 2. And I might say that this method of apportioning revenues on a mileage prorate which has been used by the carriers in making the returns to the Commissions of all the States is largely as a matter of convenience. The State Commissions' reports require that the carrier show its interstate freight revenue applicable to that particular State. No directions or methods are specified by the Interstate Commerce Commission or any State, but for the State of Minnesota the taxes are levied on a gross earnings basis and the statute requires that the method of determining the gross earnings applicable to Minnesota on which those taxes shall be figured is the mileage prorate basis, so being compelled to analyze the accounts and separate out the Minnesota freight revenue on the basis of a mileage prorate it was a simple matter to extend the same system to the other States and divide them all uniformly. However, I might say that in connection with our reports to the State Railroad Commissioners of each State we have protested that the method which we were using in separating interstate freight revenue was not a correct one but was simply being returned as a matter of record, and I would like to read into the record a copy of the protest, which appears on page 700 of the annual report of the Great Northern Railway Company to the Board of Railroad Commissioners of the State of

North Dakota for the year ending December 31, 1932,
116 and which protest is identical with that appearing on the similar page in the reports to those Commissioners for other years and to the Railroad Commissioners of other States. "The revenues from transporation shown above as derived from interstate traffic are compiled upon a straight mileage basis and are given under protest for the reason that this company does not consider that that basis accurately produces the revenues in North Dakota from such traffic." Now, as I have stated before, I have not included taxes in this exhibit anywhere because they are in dispute. If the proper amount were known they should be included, because the revenues must in the last analysis pay the taxes, but the proper amount of taxes is dependent upon the proper proportion of the system value and the proper proportion of the system value cannot be determined until the interstate revenue is properly apportioned, and, therefore, it is necessary to exclude the taxes from this computation, but it is excluded from both the figures for North Dakota and the figures for the system. If the taxes were included the North Dakota proportion would be smaller than those shown on Exhibit 12. For the year 1930, for example, which is the nearest year to the average of the five years so far as net earnings are concerned, the proportion accruing to North Dakota if you include taxes would be 11.02% instead of 11.91 as shown in the last line under the column headed 1930 on the first page of Exhibit 12. In fact in the year 1932 the railway tax accruals applicable to North Dakota were nearly double the net operating income before taxes that was available from operations within the State of North Dakota with the interstate revenue derived on a cost basis as I have done.

117 There are no rules or provisions in the freight tariffs or other records or practices of the Great Northern Railway Company providing for a mileage prorate or any other prorate of the through freight revenues as between states and none of the freight rates of the Great Northern Railway Company are published on the basis of the same amount for each mile of the movement. The Great Northern Railway Company has not received any instructions from public authorities of North Dakota or from the Interstate Commerce Commission or other public authorities for determining how much of the revenue on through freight shipments should be credited to any particular state, and the Great Northern does not for its own purposes or for any purpose other than the reports to state tax commissions that I have referred to, make any division or allocation on interstate

freight shipments through states, except the mileage prorate that I have referred to. In a rate case involving rates in the State of Minnesota where the allegation was made that the mileage prorate basis had to be returned to the State of Minnesota because it was compelled by the statute for determining the gross earnings for taxation purposes the statistician for the Railroad and Warehouse Commission under oath denied such an allegation and stated that as there were no rules prescribed for apportioning the interstate revenue, carriers were at perfect liberty to report anything that they saw fit under this heading and that they were not bound by the mileage prorate basis even in the State of Minnesota.

(The document marked "Plaintiff's Exhibit 12" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 12).

As to my criticism of a straight mileage proportion of interstate revenue to individual states, the straight mileage prorate assumes that every mile of road over which a shipment moves contributes as much to the total transportation
118 service rendered as every other mile. This, of course, is manifestly not so, first, because it costs more to operate some miles than others, such as a mountain operation versus a level plain operation, and, secondly, because the investment is greater in some miles than in others. Now I have referred to the iron ore movement in Minnesota, which originates in the Mesabi Range and moves to our docks at Allouez, Wisconsin. The movement is approximately ninety miles in the State of Minnesota and ten miles in Wisconsin, but the construction costs of the ninety miles are about the same as the construction costs of the ten miles, because the ten miles include five large concrete and steel ore docks, yards for classifying the freight before moving on the docks and sundry other terminal construction. The cost of operation of the ten miles in Wisconsin I would say was somewhere in the neighborhood of one third as much as the cost of operating the ninety miles in Minnesota, so that with a fifty per cent of the investment in Wisconsin and one-third of the operating cost the value of the transportation service contributed by Wisconsin should be somewhere between those two figures, possibly forty to forty-two per cent, but the mileage prorate of assigning revenues gives Minnesota 90% and Wisconsin 10%, so that the mileage prorate would in effect make a large deficit in Wisconsin and show a tremendous profit in Minnesota, although as a matter of fact the traffic itself is only returning a fair return, and that is exactly what the reports to the State of Wisconsin show, in many years they show that the assign-

ment of revenues to that State are less than the operating expenses in the State, notwithstanding there was net made on the system, similar to the reference I have made to the State of Washington. If independent companies were operating these two properties, that is, the Minnesota end versus the Wisconsin end, the Wisconsin company would not be content with accepting a mileage prorate, it would have to get a division of the rate based upon its cost and value of its property,

119 and at one time there were separate companies operating the docks from those handling the line haul and the division was not on a mileage prorate but the division at that time was about 40% to the dock and 60% to the line haul, so that this method of determining the net earnings in the State of North Dakota is exactly the same result that would obtain if the properties in North Dakota were operated as a separate entity that had to stand on its own bottom along with the rest of the system, allowing North Dakota full allowance for its operating expenses and for its interest on its investment the same as allowing other States through which this interstate shipment passes. Of course, North Dakota gets full benefit of all its intrastate business the same as the other States do. Similar to this situation that I have recited as to the iron ore movement is the large terminals located on Puget Sound and on the eastern end of our system. Now anyone familiar with rates knows that in no case is the rate dependent upon distance entirely, and by that I mean that the rate for a ten mile haul is not double the rate for a five mile haul, or the rate for a two hundred mile haul is not double the rate for a hundred mile haul; in fact if you had a one mile haul you would still have a fairly stiff rate as measured by the increase that would occur between 100 and 101 miles, for example, due to the terminal, the expense of the terminal service, that allowance is made in the rates just as truly as though it was set forth in a separate figure and the allowance is made for the heavy expense of operating those terminals and for the heavy investment in those terminals. As to whether every rate is in effect a laminated rate so far as the terminal service is concerned, I am saying that by the large the rates have got to be made on the basis of the cost plus a return on the investment if the company is going to stay in existence and that a schedule of rates that have grown up for many years with

120 those factors, of course, has been recognized, as Mr. Beidelman has pointed out, repeatedly by the rate making bodies in making higher rates on sections where the costs are higher and also as far as the terminal situation is

concerned the fact that all rates are made with an allowance for the terminal service even though it is not set out separately. If there was no allowance for the terminal service a rate for 100 miles would be double the cost of a rate for 50 miles, or the rate for a 200 mile movement would be double the cost for a 100 mile movement but that is not the case. The effect of the mileage prorate as far as the terminals is concerned is that it takes revenue away from the terminals where it is needed to pay the high operating cost and support the expensive plant and credits it to miles of outside line outside of the terminals where the expense of handling and costs are much less, and I have cited that in our returns to the State of Wisconsin and to the State of Washington show with a mileage prorate that in many years they are not earning their operating expenses. The same situation occurs in the territory outside of the terminals. There are different miles in that territory that costs different amounts to construct and different amounts to operate. There may be a bridge that would cost $1,000,000 a mile, there may be a tunnel that would cost $2,000,000 a mile, there may be a mile of line in North Dakota or Montana that would cost $40,000 a mile, and to say that the service rendered in transporting a shipment over those different sections of line with these different values is equal I think is a misnomer.

I might add that Section 15a of the Interstate Commerce Act requires that the revenues pay the operating expenses and a fair return, and even if this were not a part of the law, if the company is to stay in business, such, of course, must be the case.

121 Referring to Mr. Bowen's statement in connection with Exhibit 7 that the average reproduction cost less depreciation per mile of road was approximately twice as great outside of North Dakota as inside of North Dakota, I have made a computation to determine what that percentage would be if instead of using miles of road you should use miles of all track. The figure would be 1.74% instead of 1.96%. In other words, the average mile of all track outside of North Dakota would cost 1¾ times as much as the average cost per mile of all track within North Dakota. In making this computation, I gave the same weight to every mile of side-track or house track or yard track that I gave to a mile of main line track on the road. Even with all those miles assumed to be equal, I still find that the average miles of all track outside the state contains 1¾ times as much physical property as the average mile in the state.

In connection with Exhibit 12, I stated that the allowance for use of property was not based on an average earnings of 6%, 7%, 9% or any arbitrary percentage but based on the actual earnings of the property for that particular year, applying the same percentage to the property within North Dakota and without North Dakota. Now the average earnings of the Great Northern Railway Company, the net railway operating income compared with the cost of reproduction new, less depreciation, varied during these five years from a maximum of 5.85 to a minimum of .23 of one per cent, the average for the five-years being approximately 3.6%, so that by the large and for the five-years the effect of the allowance for use of property that has been used in determining the cost in North Dakota and outside has been a rate of 3.6% on the property. Now this 3.6% is determined after deducting taxes, and as I explained before, I have not included taxes in my cost computations so that the figure that I have actually used instead of being 3.6%, which is the rate of return if you include taxes, the average figure which I
122 have used is 5.15%, the 5.15% being before taxes and after you would take out taxes what would be left would be 3.6%, but as I am determining the net before taxes I have used the rate of return before taxes, which is 5.15% on the average for the five-years, and treated North Dakota the same as the balance of the system. It would be correct to say that in apportioning my interstate freight revenue, the only allowance that I have made for the value of terminal property and for the value of tunnel property and higher cost property in other states is, on the average, an allowance of 3.6% above taxes.

When the mileage prorate system advocated by the state in this case is applied, it does not leave some net railway operating income in every state in each year when the system has net railway operating income. As I explained before, for the State of Washington and for the State of Wisconsin, South Dakota and other terminal states, frequently the amount of revenue assigned to those states on the mileage prorate is less than sufficient to pay the operating expenses let alone their taxes or any return upon their property, not in every year but in many years. In those same years when the mileage prorate would leave a deficit in the three or four states that I mention, it must necessarily leave a corresponding higher return in the other states like North Dakota, because there is net on the system every year. There has been no year in which there has not been some small net left from the system operation.

As to the extent to which my apportionment meets these defects that I have mentioned, my method first allows to each State its operating expenses and then credits in proportion to the cost of providing the plant within that state. This method is identical with the method that would be adopted if there were separate ownerships; in other words, if we had a line separately operated and owned from the North
123 Dakota border west similar to the Puget Sound extension of the Milwaukee at one time, the division of rates between those sections East and West of the North Dakota-Montana line would not be on a mileage prorate but would have to be on a basis similar to the one I have adopted, which allows for all elements of cost on both sides of the dividing line.

If there were two independent connecting companies and the cost of producing the service on one of them were 75% of the total and the cost of producing the service on the other were 25% of the total, they would not divide the revenue equally just because the mileage happened to be equal. I cited the case of the terminal operations at Lake Superior which at one time was carried on by a company independent from the company operating the main line or the road service, and in that case the terminal company was demanding about 40% of the through rate instead of about 10% which they would get on a mileage prorate.

My method of apportionment differs from a straight physical property allocation based on reproduction cost less depreciation because a straight physical property value would not allow for the volume of the traffic. Value, of course, is dependent upon the net earnings largely and a cheap line with heavy traffic would be entitled to a higher value than a more expensive line with lighter traffic. My computation reflects both the volume of traffic and the value of the plant. For example, on page 2 of Exhibit 12, line 9, is a cost of handling interstate traffic and includes an allowance for the operating expenses and a return on the investment both within and without and gives effect to the volume as well as to the physical value of the plant. That is because I multiply the volume as measured by ton miles by the average cost on interstate traffic. The intrastate traffic is allowed 100% to the state in which it occurs.
124 Under my method, credit is allowed to a state for a more costly plant or for a greater cost of providing the plant by increasing the element of cost which reflects the value of the plant. Turning now again to Exhibit 12 on page 2, line 4, is the allowance for use of property based on the I.

C. C. cost of reproduction new, less depreciation, plus additions and betterments since valuation date, the higher the cost of the plant the larger would be the assignment of cost to that particular state and, therefore, the larger the proportion of interstate traffic revenue. The result would be that the more valuable the plant the higher would be the cost and, therefore, the higher the assignment of revenue.

As far as the wholly intrastate freight traffic is concerned, my method gives to a state its actual net from the operations of that traffic based on its gross and its operating expenses without paying any attention to the cost of the plant, so that if a given state had a very heavy volume of intrastate traffic but a very cheap and inexpensive plant, it would still get full credit for the net that would result from the cheaper plant and being less costly to operate and a smaller investment. In making the assignment as I have done, I assigned to the intrastate revenue the same cost of plant per ton mile as is assigned to interstate traffic, but it is applied only to the actual movement intrastate.

In the operating expenses for North Dakota which I have shown on Exhibit 12, the operating expenses in North Dakota are in general the operating expenses incurred entirely within the State, that is, the maintenance of way expenses is the actual expense of maintaining the particular tracks that lie within North Dakota and have nothing to do with the cost of maintaining the tracks in any other state. The main-
125 tenance of equipment expenses, so far as maintenance of the locomotives is concerned, the amount assigned in North Dakota is the amount of maintenance put on the particular locomotives that are operating within the State. So far as the maintenance of cars is concerned it is impracticable to keep a record of the cost by individual cars and the movement thereof as we own some 50,000 cars that are moving all over the country and a great many foreign cars on the line at the same time, so that the apportionment to North Dakota and to every other state is made on the basis of the car miles within North Dakota compared with the total system car miles as applied to the total cost of car repairs. As far as the transportation expenses are concerned, the wages of the men operating the trains in North Dakota is charged to North Dakota and there is no part of the wages of men operating trains in Washington or in Montana or Minnesota included within the North Dakota figures. The station expenses of operating the stations are the cost of operating the stations within North Dakota, and none of the station expenses connected with operations outside of North Dakota.

Now when I said that those expenses were not wholly those incurred within North Dakota I had reference to two principal items, the traffic expenses and the general expenses. Now the general expenses are the general offices, all the clerks in the main general office. The traffic expenses include the traffic solicitation. These traffic solicitors are moving all over the line and we do not assign the cost of these men according to the accident of location, but as far as the general expenses and the traffic expenses are concerned they are assigned to the states on the basis of the relative train miles in North Dakota to the train miles on other portions of the system. With the exception of those two items, which are small items compared with the total, the assignment of expenses to North Dakota is what might be stated on an actual basis of
126 the expenses incurred within the state. Taking, for example, the report to the State Commission for the year 1929 the total operating expenses assigned to the state was $14,079,000. Of that amount the traffic expenses were $625,000 and the general expenses were $539,000, a total of $1,164,000 out of $14,000,000 or approximately eight per cent.

In addition to the North Dakota operating expense that I have shown on Exhibit 12, the performance of the transportation service in North Dakota involved some other operating expenses outside the state which I have not included in my exhibit and to which I have paid no attention. There is the element of the movement of company freight. That takes on some pretty large figures, amounting to roughly ten to twelve percent of the total. The movement of coal from the head of the lakes into North Dakota for the operation of the engines in North Dakota, the movement of lumber from the Pacific Coast into North Dakota for the purpose of repairing cars in North Dakota and engines, the movement of steel. Now this element of the handling of company freight on the basis of the accounting divisions as made rests within the State where the service is performed; in other words, the cost of wages and fuel incurred in the State of Minnesota for handling of traffic, both revenue traffic and the coal for the use of North Dakota is charged to the State of Minnesota and there is no attempt to prorate that figure back to the state for whose benefit the cost is incurred. The wages are the wages and the fuel and so forth that actually physically existed within that state. Now North Dakota is a central state in the center of our system so that material is conveyed into it from both ends of the line, and while it has some offsetting haulage of company freight for the benefit of other

states, such as lumber passing through the state for the benefit of Minnesota, the amount is much larger in the handling of other states for the benefit of North Dakota than vice versa. I worked the figures out for one year and
127 roughly the figures were 100,000,000. net ton miles of company freight handled in other states for the benefit of North Dakota, 98,775,511, for example, against 33,410,433 net ton miles handled in North Dakota for the benefit of other states. No coal moves through North Dakota for use in Montana or Wisconsin. The coal movement is from the head of the lakes into North Dakota. The Montana fuel is derived from a source in the State of Montana, either oil from the Montana oil fields or coal from the Central Montana fields. Our system breaks at Williston into what we call our lines East and lines West. It is a physical division of the line under different general managers and in general the operations East and West of that line are decidedly different. The operations East of Williston use the Eastern coal and lines West use the Montana oil and Montana coal.

If these additional operating expenses incurred in Minnesota and other states for the benefit of North Dakota operations were shown in my computation and charged to North Dakota with the off-sets that I mentioned, it would result in a smaller percentage being assigned to North Dakota, probably a very small decrease. I cannot say exactly how much because there is no way of determining the exact cost of handling this company freight. This decrease would result because I would have a somewhat larger operating expense to deduct from the gross in determining the net for the state.

The interstate passenger revenue I have left the same as it was assigned in the report originally, that is assigned to North Dakota on a mileage prorate. As far as the passenger revenue is concerned it is a relatively small item of your total revenues. Again the passenger rates are constructed on a mileage basis. You can move for two cents a mile anywhere on the Great Northern system, North Dakota, Wash-
128 ington, or anywhere else so that their rates are not constructed on this laminated basis as is the case with the freight rates. The allocation of passenger revenue on a basis similar to the one I have used for the freight to North Dakota would decrease the percentage of the system net earned in North Dakota, but I have not done that for the effect of simplicity and I believe that the passenger revenue being so small would have very little effect on the total. I have given North Dakota some increased allowance both by omitting the operating expenses incurred in

other states and by leaving the mileage prorate for passenger service. I will say right here that these figures that I have computed with an average of 12.22 for five years and 11.71 for three years do not represent the exact proportion to the last one-hundredths of a percent but that they do indicate approximately in a scientific method the percentage that should be assigned to North Dakota, which might be a half of a percent more or a half of a percent less than the figures that I have shown.

As to the extent to which my method gives a higher value to a state because it is a state of low operating cost and cheap operation, of course, you would have a low assignment of interstate revenue to that state in the first place, but when you come to deduct your operating expenses you would deduct a low operating expense and, therefore, to that extent you would increase the net and the full benefit of the intrastate traffic is given to the low cost within that state.

I should say that my method of computing the value of the railroad property in North Dakota was exactly similar to the method that you would use in determining the net earnings of any business. I have allowed the full intrastate earnings and the total cost measured by the operating expenses and interest on the plant as they existed. Then it is necessary to determine how much of the charge for interstate
freight movements was earned in North Dakota and
129 and how much in other states. I prorated the interstate freight revenue on the basis of the cost and then adding that up with all the other revenues and deducting the expenses I found the net.

The only difference between the determination of the value of the railroad property in a state and the determination of the value of a manufacturing plant located in the state would be that in the case of the railroad property you have certain revenues that are earned partly in other states and it is necessary to prorate that kind of earnings. As I explained yesterday, my method would result in assigning 11 or 12% less of the total revenue to North Dakota than the mileage prorate, and I do that by assigning it in proportion to the number of dollars worth of service performed in each state instead of the number of miles of track.

I have prepared the statement marked Plaintiff's Exhibit 13 to show how the Great Northern mileage in North Dakota compares to that on the other parts of the system in tons of freight originated per mile of road. The figures are taken from official reports and are correct. The last three items

on this sheet show that the tons of revenue freight originated per mile of road operated in North Dakota was from one-third to two-thirds of the average for the balance of the system, being 1,204 in 1930 compared to 3,689, 835 in 1931 compared with 2,117, and 645 in 1932 compared with 990 for the balance of the system.

I have also prepared a similar comparison showing the amount of traffic carried per mile which is marked Plaintiff's Exhibit 14. These figures are also taken from official records and are correct. This comparison shows the net ton miles per mile of road, which is commonly referred to as the traffic density, the averages being the last three figures on the sheet. The figures show that North Dakota during
130 the three years had from eighty to ninety per cent as many net ton miles per mile of road as the balance of the system.

(The documents referred to were offered and received in evidence and are included herewith as Plaintiff's Exhibit 13 and Plaintiff's Exhibit 14)

The average net railway operating income, without considering taxes, for the five years, 1928 to 1932, as shown on page 1 of Exhibit 12, for the State of North Dakota was $3,464,-338. During those same five years the average taxes, railway tax accrual, were $1,727,771.00, leaving $1,742,567 as the net railway operating income after allowing for taxes applicable in North Dakota. Now capitalizing this at seven per cent would give a value to the property in North Dakota for the average of the five years of $24,893,814, or if capitalized at six per cent a value of $29,042,783, as compared with an assessed valuation of $78,000,000. That valuation includes the high earning years of 1928 and 1929. In 1932 the net before taxes, as shown on Exhibit 12, for the State of North Dakota was a little over half as much as the taxes, so that for that year North Dakota failed to earn the amount of the railway tax accruals by some six or seven hundred thousand dollars.

To the extent that the taxes actually paid in North Dakota may have been excessive during those five years due to the use of the mileage prorate or any other cause, that would tend to reduce the value. If the taxes had been lower than they were the value would have been increased.

I cannot see any difference in principal between the method of allocating the value of an interstate railroad which is advocated by the state in this case and the application of the same method to an interstate electric power

company. I would say that the method was exactly
131 analogous to the situation that would exist if we had a power production system at say Fort Peck, Montana, transmitting power across the State of North Dakota and serving North Dakota, into Minnesota and distributing the most of its power in the Twin Cities. In a case of that kind you would have an investment for the power plant and transmission lines in Montana of probably $50,000,000. The cost of the line across North Dakota and whatever substations you would need would possibly be $2,000,000, and the cost in the State of Minnesota, including its expensive transmission to residences and industries in the Twin Cities would possbly be $50,000,000, I am just giving assumed figures and round figures, but the mileage through North Dakota would be double the mileage in either Montana or Minnesota, therefore, on a mileage prorate basis one half of the total revenue collected by that industry would be assigned in North Dakota and one quarter to each of the states of Montana and Minnesota, thereby giving a return of 70% say on your investment in North Dakota and not assigning enough to either of the other two states to pay the operatig expenses, when in fact the rates were made on a basis of allowing a 5% return on the property value. Now it don't make any difference whether you divide that revenue up, it don't make any practical difference whether you divide it up or not on the transmission mile or wire mile, which is analogous to a road mile or a track mile, there would be same additional wire miles in the Twin Cities which would slightly decrease the assignment to North Dakota, possibly makng it 48% instead of 50% of the total, or it does not make any difference if you divide it up on the ampere miles or ohm miles or volt miles or any other basis exactly analogous to your car miles or your ton miles or your locomotive miles, you would get the same thing, you would have an assignment of double the revenue to North Dakota that you would get in assigning to either one of the other states. Now the same
situation exists in dividing interstate freight revenue
132 on a mileage basis only to a much less exaggerated extent than would be the case with an electric transmission system, but nevertheless the fallacy is there just the same to a smaller degree. As I have said, this assignment of mine takes from North Dakota about 11% of the revenue that is assigned to it on a mileage prorate and the other bases that have been used. If my assumed system value of $102,000,000 for this transmission plant were allocated to the State of North Dakota on a composite ratio of miles of line and miles of wire and ampere miles and volt miles and ohm

miles, the $2,000,000 worth of property that I assumed was located in North Dakota would be given half of the total investment of $102,000,000, giving an assessed value of $51,000,000 in North Dakota for a $2,000,000 plant. The assessed value in each of the other states would be $25,500,000 on a $50,000,000 investment. I would contend that in a case of that sort the allocation ought to be made in proportion to dollars worth of service produced in each state instead of miles, for the same reasons that I have already stated for railroad property. If the over-all rates would give a five per cent return on the system, then the property in North Dakota would be earning 5% and not 75% as would be produced by this arbitrary basis assigning a loss to the other two states, not assigning enough revenue to pay their operating expenses. There is no difference in principle between assuming that every mile of an electric production transmission plant is the same and assuming that every mile of a railroad line is the same because it is of the same length.

Referring to Mr. Beidelman's testimony that in fixing freight charges generally both the Commission and the company have recognized higher costs of service and have increased rates to reflect higher costs in certain sec-
133 tions, I have prepared a statement showing the cost per revenue ton mile intrastate in each state in which the system operates for the years 1932 and 1933. This statement is marked "Plaintiff's Exhibit 15". The figures are taken from official records and are correct.

(The document referred to was offered and received in evidence and is included herewith as Plaintiff's Exhibit 15).

Exhibit 15 shows that the revenue per net ton mile on intrastate traffic in the States of expensive terminals like Washington, Wisconsin and Minnesota are higher than the revenue per net ton mile in the State of North Dakota and that the revenue per net ton mile on intrastate freight in the State of North Dakota is less than the revenue per net ton mile on intrastate freight on the system. Now I am not claiming that the difference in the revenue per net ton mile on intrastate freight is an exact measure of the difference in cost of these various states because the revenue per net ton mile is dependent upon the nature of the commodities moved and the length of the haul, but I do declare that this exhibit gives an indication of the situation and that I am not intending to draw the idea from it that the State of Wisconsin with a revenue per net ton mile in 1932 of nearly ten times as much as that in North Dakota on intrastate freight

is because the costs in Wisconsin were thirteen times as much as those in North Dakota.

It is generally true that the charge for a very short movement is relatively higher than the charge for a longer movement and of course all these intrastate revenues which average around 2c are much higher than our average revenue on interstate freight, which averages less than 1c.

134 On the Great Northern, the longest possible haul in Wisconsin intrastate would be 15 or 16 miles so that it would consist almost exclusively of terminal service. That would account to a certain extent for the high revenue per mile there.

I have prepared Plaintiff's Exhibit 16 showing the net operating income of the Great Northern Railway Company for the years 1928 to 1933, inclusive. The net railway operating income figures are taken from official records and are correct and the other figures are computations from the net railway operating income. The net railway operating income is the net money earned by the operating property and is determined by taking the operating revenues, subtracting the operating expenses and the taxes, also the uncollectible railway revenue and the equipment rents and joint facility rents, and it is a factor that has been created and named such by the Interstate Commerce Commission and was used as a measure of the earnings of the carrier under Section 15A of the Interstate Commerce Act to determine the amount that was recapturable, if any.

The first line of figures is the average net railway operating income for five years from 1922 to 1932, 1932 was the last year that the figures were available when the 1933 North Dakota assessment was made, so that the first line from 1928 to 1932 is a five year average of the net railway operating income capitalized for the system at six per cent, giving something over three hundred and thirty-two million dollars; at seven per cent something over two hundred and eighty-four million and at eight per cent something over two hundred and forty-nine million dollars. The second line of figures at the bottom of the sheet shows similar information using only the three years 1930, 1931 and 1932, which shows at a six per cent rate a value of less than two hundred million, at a seven per cent rate of one hundred and sev-

135 enty odd million and at an eight per cent rate something less than one hundred and fifty million. The one year figure, 1932, which was the last year available when the 1933 North Dakota assessment was made, if capitalized

at six per cent would produce a system value of twenty-one and a half million dollars on a six per cent basis; about eighteen and a half million dollars on a seven per cent basis and slightly over sixteen and a half million dollars on an eight per cent basis.

I have prepared a statement showing the yield to owners of Great Northern bonds based on the average prices of 1932 and 1933. This is marked "Plaintiff's Exhibit 17" and the figures are correct. I computed these figures by taking each issue of outstanding bonds during the year 1932, for example, figuring the yield to maturity on those bonds on each issue based on the average price for the year 1932, and then we take the total return or yield to maturity for each issue by the volume of that issue. In other words, our first and refunding bonds that were selling in the neighborhood of par would be a yield to maturity of 4¼%; our seven per cent bonds which were selling at fifty or sixty dollars would yield to maturity much more than seven per cent, in the first place first because you would receive $7.00 return on a sixty dollar investment say, and secondly that when maturity occurred in three or four years instead of receiving the $60.00 that you paid in you would receive $100.00 back. There are bond tables prepared which gives effect to both the rate of interest and the year of the maturity of the bond and also allows for the fact that receiving the additional bonus, if you may call it that, between the market price and the par value some years in the future, is not equivalent to receiving the same money or a proportionate share of it at the present time but is discounted in these tables for the present worth of the extra dollars which will be received at some years hence. The par value of all of our bonds out-
136 standing is slightly over three hundred and fifty million dollars and the average market price of each class of bond for the year, considering the high and low for each month, the rate of return of the security and the year of its maturity gives a yield to maturity on our outstanding bonds of 10.72% in 1932 and 11.23% in 1933. All bonds are purchased on the basis of the yield to maturity and not on the basis of the current yield. The 10.72% is based on 1932 average market prices and the 11.23% is based on 1933 average market prices.

(The documents marked "Plaintiff's Exhibit 16" and "Plaintiff's Exhibit 17" were offered and received in evidence and are included herewith as Plaintiff's Exhibit 16 and Plaintiff's Exhibit 17).

The yield on bonds in 1933 was very high, higher than it had been in previous years and higher than it has been since that time for both the Great Northern bonds and general bonds in the general bond market. That was true generally of railroad bonds as well as industrial bonds.

I have prepared statement showing the average market values of the stocks and bonds of the Great Northern Railway Company for various recent periods and allocating a portion of that total value to railroad property. This statement is marked "Plaintiff's Exhibit 18". The figures are correct and correctly show what they purport to show. The net railway operating income in column No. 2 are the figures showing the earnings from the railway property and are similar to the figures on Exhibit 16. The net income from other properties and securities, column 3, is the income from all other sources other than the railway operations, minus the deductions for amounts paid for all other causes than railway operations except for interest on bonds, so that
137 the total amount shown in column 4, the sum of items 2 and 3, is the amount available for paying bond interest and return to the stockholders. Column 5 is a ratio of the net railway operating income and the money derived from the operating property to the total net income of the system, that is the relationship of column 2 to column 4 and varies from 73% in 1929 to 22% in 1932, with an average for the five years of 64.51%. That is a weighted average. The arithmetical average would be somewhat different and give a somewhat lower percentage assigned to the net operating income. It would be nearly 56% instead of 64.5%. The lower part of Exhibit 18 shows the average market value of the stocks and bonds separately and the total value of these stocks and bonds. These figures are determined by taking the average high and low for each month in the year, that is twenty-four figures, and averaging them to obtain the average market price for that particular security, taking each class of bonds separately for that year and multiplying that average price by the number of outstanding units of the security gives the average market value of that particular issue and summing those items together we produce the total figures shown in columns 2 and 3.

Now column 5 is the separate value of the railroad property based on the average market price or value of the stocks and bonds, which is determined by applying to column 4 the ratios of the net railway operating income, the total income shown in column 5 in the upper part of the sheet. In other words for the year 1932 in the lower half of the sheet, the total average market value of stocks and bonds is shown as two

hundred and ninety-six million dollars in column 4 and by taking 22.06% of that volume which is shown in column 5 opposite the year 1932 in the upper part of the sheet, we obtain the separate value of the railroad properties as distinguished from the value of outside property of $65,364,040 shown in column 5, because the stocks and bonds cover not only the railway property but all the outstanding other proper-
138 ties that belong to the Great Northern system.

The figure of $238,000,000 at the top of column 5 is the average for the three years 1930 to 1932. The ratio that I applied to this was a three-year average ratio and not a five-year average. I used the weighted average of the three-year average ratio, which is approximately 53½%. The same way with the two year figures for 1931 and 1932, the weighted average for the two years basic data shown in the columns 2, 3 and 4 in the upper part of the sheet is used to obtain a percentage to apply to column 4 on the lower part of the sheet to produce the figures in column 5.

Column 6 is a separate determination of the average market value of stocks and bonds for the system belonging to the railroad property and is determined by substracting from column 4 on the lower part of the sheet the total market value, the figure in the exhibit produced by Mr. Schoettler of one hundred and eighty-two odd million dollars reflecting the value of the outside property other than the railway property. That, of course, produces somewhat different figures from those in column 5 based on the per cent of income.

I have prepared Plaintiff's Exhibit 19 which shows the allocation to North Dakota of these system values that I have computed. This statement is correctly computed and correctly shows what it purports to show.

Lines 1 to 4 of Exhibit 19 show what we believe to be a correct computation of our value in North Dakota. The first line is the average earnings for the years 1930 to 1932 capitalized at 7%. The years 1930 to 1932 were used instead of a longer period because the prior years belong to an era that is past and throws little or no light on the present or future earning power of our system. The 7% rate is the smallest rate that we believe can be justified in capitalizing these earnings as I have shown by Exhibit 17 that investors were requiring 11% return on our bonds, which are a prior lien on the property in purchasing this
139 prior lien during the years 1932 and 1933. The capitalization of those average earnings at 7%, which are shown on Exhibit 16, is $170,821,329. The second line shows

the average stock and bond value, 1930 to 1932, using the railway income proportion as developed on Exhibit 18, column 5, in the lower portion of the sheet, and is $238,014,150. It would probably be more logical to use the current year figures as the investors' judgment on the current value of the property, including the future prospects, but I have used the three year average in both of these items, and item 3 is the average of these two figures, items 1 and 2, giving a system value for the operating property of $204,417,740. Now if 11.71% of that be allocated to North Dakota, which is the three year average shown in the last column of Exhibit 12, page 1, the computation of the net railway operating income applicable to North Dakota, I say if we use 11.71% as representing North Dakota's proportion of the system value we would get a figure representing North Dakota's proportion shown in the last column of item 4, as $23,937,317. If you used the five year factor from Exhibit 12, giving North Dakota 12.22% of the system value, the amount applicable to North Dakota would have been $24,979,848. The next group of figures, marked small a to e are the five averages which the defendant in its answer in this case states should be used, namely, mileage of all tracks, the car and locomotive mileage, the revenue traffic units, the gross operating revenues, using a mileage prorate of through revenue all through the five year average except the mileage of all tracks and the physical property as measured by the cost of reproduction new, less depreciation, and taking these five averages and obtaining an arithmetical average of these averages a percentage of 18.25 is obtained instead of the 11.71 determined by considering the net earnings in North Dakota as developed on Exhibit 12.

If the State's figures of 18.25 be applied to the system
140 value, which I have shown on line 3 of $204,000,000, the allocation to North Dakota would be $37,306,238 as shown in the last column on line 6. Now I have put on this exhibit for the benefit of the Court figures representing the highest value shown on Exhibit 16 on line 7, which is the capitalization at 6% of the average net railway operating income and using five years instead of three years as I have done up above. I have also shown on line 8 the highest value shown on Exhibit 18 for the stock and bond value of the operating property, which is $260,910,990 and taken an average of these two highest figures in line 9 to produce the system value of $296,495,612. This $260,000,000 in line 8 I might say gives the railway property more than an income proportion of the total stock and bond value and is, as I have said, the highest figure shown on Exhibit 18 as the system value. Now taking the average of these two highest values and applying the 11.71% shown on Exhibit 12 as the amount allocated to North

Dakota would give a value in North Dakota of $34,719,636, whereas if you had used 18.25%, which is the percentage claimed by the defendants in this case, the value would be $54,110,449. This percentage I think is much higher on system value than is justified with a much higher percentage applied in North Dakota. These figures then could be compared with the assessed valuation, item 12 of Exhibit 19 in North Dakota in 1933 of $78,832,888. In other words, using the highest value that I have determined with a 6% capitalization of net railway operating income and the highest value on the stock and bond figures for three years and applying the State's percentage of allocation to North Dakota, which we believe to be too high, produces a value of the property in North Dakota of $54,110,449, which is 69% of the assessed valuation for the year 1932, or 31% in excess; in other words, the assessed valuation is 45% in excess of the North Dakota proportion as determined on line 11, using the highest
141 possible system value and the highest possible percentage applicable to North Dakota.

(The document referred to was offered and received in evidence and is included herewith as Plaintiff's Exhibit 19).

In the reports of the Company to the North Dakota State Tax Commission, the average market value of stocks and bonds are shown each year and also the net railway operating income for each year and the income from outside stocks, so as to include all of the basic figures that I have been using in these exhibits.

As to reasons why the use of a five year period of average earnings instead of a shorter period would be particularly objectionable in 1933, reference to Exhibit 18 will show the net railway operating income for the five years 1928 to 1932, beginning with $31,000,000 in 1928, $32,000,000 in 1929, $22,000,000 in 1930, $13,000,000 in 1931 and $1,000,000 in 1932, the most recent year. Now using a five year average you would get exactly the same result if the net railway operating income instead of having been $31,000,000 in 1928 and $1,000,000 in 1932, the most recent year, I say you would get the same result on an average if the net operating income had been $1,000,000 in 1928 and $31,000,000 in 1932; yet I do not think anyone would contend that a property with an increasing net income to $31,000,000 from $1,000,000 net operating income over a five year period was not worth a great deal more than a property whose net operating income has gone from $31,000,000 five years ago to $1,000,000 at present, and yet the five

year average would give identically the same figure. I say the value of the property is more dependent on its current earnings, its earnings just prior to the current year, than it was five years ago although on a five year average you would get exactly the same value of the property.

142 Roads with ascending earnings are more valuable than roads with descending earnings, although the average for five years may be the same. I do not know of any way to overcome that situation except to weight the later years more heavily or else use a shorter period of three years as I have done.

As to the large difference between my allocation factor of 11.71% on Exhibit 12 and the state's allocation factor of 18.25% if you will turn to Exhibit 19, the items a, b, c, d and e shown thereon are the State's allocation factors; those are the five factors that the State uses in determining its ratio of 18.25%. Now the first four factors are very close to one another, showing but slight variation, and they all are the reflection of a mileage situation, so that you have that situation multiplied by four in determining your average of the five items, whereas the physical property, the last item, with an average of 13.85% has a weight of only one in the method that they have used. They assume, for example, on the mileage of all tracks that each mile of track in North Dakota is the same as every mile of track outside of North Dakota as though they were all equal; they assume that the movement of a car one mile in North Dakota that costs maybe ten or fifteen cents and requires a use of $50,000 worth of property is the same or equivalent to the cost of moving a car one mile in a terminal where the cost may be $3.00 for the car movement, and the value of the property may be a million dollars a mile. The same thing is true as to the locomotive miles, ton miles, the revenue traffic units and the gross operating revenues which are divided again on the miles of road. I might illustrate that again, if the Court please, by referring to this Mesabi Division where our ore movement occurs. If we were determining these four factors for the Mesabi Division, comparing Minnesota with the total of the Minnesota and Wisconsin figures to obtain the percentage,

143 the miles of all tracks in Minnesota would be slightly less than the miles of all road because there are many miles of track at the docks in Wisconsin that would be given weight in that factor, so that for the mileage of all tracks you might have a figure of 85% assigned to Minnesota, but for the car and locomotive miles there would be 90% of the miles made in Minnesota, so that that factor too would

have a weight of 90%. The third factor, the revenue traffic units, 90% of the ton miles would be made in Minnesota, The gross operating revenues divided on a mileage prorate 90% would be assigned to Minnesota, so of those four factors you would have 90% assigned to Minnesota in all cases and ten per cent to Wisconsin, except for the small effect of the bigger proportion of all track mileage in Wisconsin which would lower that first factor a little. Now that same effect has bearing through the system and you notice how close together the figures are for the State of North Dakota, so that the effect of the mileage is being given a weight of four and the other element, the physical property, is given the weight of one. Indeed, there is still a worse situation than that arises, because take the car and locomotive miles, for example, the car miles as computed in our reports end with the arrival of the car at the terminal. There are no car miles figured after the train is broken up although the car may be moved many miles within the terminal. The locomotive miles end with the arrival of the locomotive at the terminal. Although there are many switching locomotive miles made there is no consideration given in these factors; and the revenue traffic units and ton miles are not figured to the exact ultimate destination, but to the point where the train movement ceases. Similarly the gross operating revenues that is divided on a mileage basis is divided on a road mileage and not on a track mileage basis, so that in determining this average percentage for North Dakota all the car
144 miles, ton miles and locomotive miles made in the terminals in Washington or Minnesota are left out of the computation, thereby swelling the percentage applicable to North Dakota. When the percentage is applied to the system value the State then argues that it is proper to take the value of these terminals in apportioning the amount to the State but in determining the factors they leave out these traffic units in determining the percentages. Now I am not saying and I do not want to be understood that they are doing anything improper, I do say it is improper but not wilfully wrong because that is the way the figures are put up, but it is a fact nevertheless that it is impracticable, of course, to have a speedometer on every car and measure its movements around the terminals and through the terminals, so that the elements of car miles and ton miles do not include any allowance for the movement of the car within the terminals, so, therefore, the percentage that is assigned to North Dakota is larger than it would be if actual mileage of the movement of the car were considered.

Of course, the factors of car and locomotive miles and ton miles give some reflection of the traffic density on different sections of the line, but when they consider a locomotive mile on a branch line in North Dakota, and we have lots of them, as being equivalent to a locomotive mile handling an ore train of one hundred and seventy cars in Minnesota, which this road very frequently does, I then say you are producing results that are inequitable. The year round a locomotive on a North Dakota branch line might handle around 200 to 400 tons per train as a generous figure. It would take about 70 locomotive miles of that character to produce the same amount of transportation that is produced by one locomotive mile on an ore train.

145 The average car loading in the State of North Dakota is around sixteen tons, whereas the average car load on the system outside of North Dakota would be nearly thirty tons, and yet a car mile in North Dakota is considered equivalent to a car mile on the rest of the system in working out these percentage averages.

Referring to Mr. Bowen's testimony that the Great Northern by making investments in tunnels and line changes outside North Dakota has shortened the track mileage outside the state and thereby increased North Dakota track mileage proportion of the system, a similar result is followed from the company's investment in locomotives for use in other states. The development of transportation on the Great Northern has been a progressive purchase of heavier locomotives for use in territory outside of North Dakota with a corresponding reduction of the locomotive miles made in that territory. In other words, by putting heavier locomotives on certain sections we were able to eliminate helper locomotives and thereby reduce the locomotive miles in those sections. That is a situation that has been occurring progressively for the last twelve to fifteen years so that at the present time by the use of these larger locomotives, with heavy investment therein, costing $110,000 apiece, we are able to reduce the locomotive miles in the territory outside of North Dakota and thereby by the State's formula assign a bigger percentage of the locomotive miles to the State of North Dakota.

That process was followed more outside North Dakota than in North Dakota because the territory outside was susceptible to such an arrangement. The heavier grades occurred outside of the state. The desirable thing in train operations would be to start a train out of the Pacific Coast terminals and move it into the Twin City terminals without

breaking up the train, use a block of four thousand or five thousand tons and so move it. We have been working to that situation on the Great Northern and there
146 was a time when it was necessary to break that train into two units where the grades were heavy and take the train across with two train miles instead of one, due to the grades in both the Cascade and the Rocky Mountains. Now with the use of this heavier power we are able to move a block of tonnage from forty-five to forty-eight hundred tons from the Pacific Coast clear through without double heading or breaking the tonnage and with only the use of helpers where the grades are the steepest for short distances. It follows that North Dakota now has a larger percentage of the total locomotive miles without having made any increased investment or change in the method of operation in North Dakota.

As to how the operating cost per ton mile or per car mile in the principal Great Northern terminals compared with the average cost of road haul per mile, speaking in general and by the large it costs about half as much to handle a car in the terminals, that is the two terminals, as it does to move it on the road. The average road haul on all freight in the Great Northern is around three hundred miles and the terminal handling may be average, say ten miles, or the terminal handling mileage is one-thirtieth of the road haul mileage and with a cost in the terminals of one-half as much as the cost for the road movement, the average cost per ton mile or car mile in the terminals would be fifteen times as much as for a movement one mile on the line. Those are just rough approximate figures, but are based on studies that have been made many times by various people as to the relative cost of terminal and line haul movement.

I do not know of any unit of allocation that can possibly reflect the various differences between road haul movements and terminal movements and between movements in mountain districts and movements on the plains and so on, other than the unit which we have called a dollars worth of
147 service. I do not know of any other unit that is not subject to all the objections I have been citing.

Referring again to Mr. Bowen's testimony to the effect that track mileage in other states has been shortened by additional investment in those states, the immediate effect of that if the state's allocation method by five factors is followed, would be that the additional investment made for the purpose of shortening the mileage would decrease the value in that particular state and increase the value in every other state, and that is because the mileage of all tracks,

item a, would be decreased in the state where the improvement was made, the car and locomotive miles would be decreased because the through trains would be passing over a shorter track, the revenue traffic units would be decreased similarly, the gross operating revenues assigned on a mileage basis would be similarly decreased, although the fifth item the physical property value would be somewhat increased, so four factors would be decreased, for the state where the improvement is made. Conversely, in all the other states four factors would be increased and one factor decreased; so that the effect would be to transfer value from the state where the improvement is made to the other states. By creating this tunnel investment in Washington of $26,000,000 that Mr. Bowen testified to, on the defendant's method of allocating value to states the investment or the value of the property in North Dakota has been increased.

Under accounting rules as established by the Interstate Commerce Commission, when expensive tunnels or regrade projects are installed for the purpose of reducing operating expenses in that section, the income statement as reflected in the net railway operating income is increased due to the cheaper operation as a result of the additional investment. There is nothing allowed in this net railway operating income for the interest on the bonds or the investment,
148 it is purely an operating revenue minus operating expenses, taxes and a couple of other smaller items, so that making an investment for the purpose of cutting down operating expenses increases the net although there may be an offsetting charge down in the bond interest for the bonds and new money that had to be provided to make possible that improvement.

If you then obtained a system value by capitalizing that increased net you would get a corresponding increased system value. If you were to take the net operating income after the expenditure of $26,000,000 for those tunnels had been made and presuming that net operating income was higher than it would have been if the improvement had not been made which was the basis of making the improvement, then the system value as determined by capitalizing that net railway operating income would be increased because of the application of this new money. At the same time the proportion assigned to the state where the improvement occurred would be reduced by using the method advocated by the defendant in this case, so you would have the double-barreled effect of increasing the percentage of the system net assigned in North Dakota because of this improvement made in the

State of Washington, and when applying that percentage to the increased net for the system a still higher value would be assigned to North Dakota. North Dakota would get a higher percentage of a higher system value because of an improvement made in another state, as would every other state also outside of the state where the improvement occurred.

I have prepared a statement marked "Plaintiff's Exhibit 20" showing the decrease in value of the Great Northern Railway Company from 1932 to 1933. The figures are correct and correctly show what they purport to show.

149 This exhibit is simply a putting up in concrete form the decrease that has occurred between 1931 and 1932, first on the basis of the net railway operating income, secondly on the basis of the average market price of stocks and bonds of the Great Northern Railway Company, and third, of the assessed valuation. Now in order to not be extreme and use the comparison of the single year 1931 and 1932 I have taken on line 1 the five years ending with 1931 and on line 2 the five years ending with 1932, and have shown the average net railway operating income and the percentage decrease of 21.89%. If a three year average ending with 1931 and 1932 were similarly treated the decrease as shown in the last column would be forty-six and approximately one-half per cent. If comparison of 1932 were made with the year 1931 the decrease would be 89.81%; the average of these percentages being 52.73%; that is a flat average or arithmetical average. Similarly I have taken the average market price of the stocks and bonds attributable to the railroad property by the method shown on Exhibit 18 and have shown a percentage decrease with three year figures ending with 1931 and 1932 of 32%, for the two year figures of nearly 40% and for the one year figure of 72.94%; that is comparing the decrease in the average market price of stocks and bonds from the year 1931 to 1932; the average of these percentages being 48.31%, which is closest to the 52.73% developed on the basis of the net railway operating income in the upper half of the sheet. Averaging these two average per cents, or what is the same thing, averaging the six percentages of decrease, three on the basis of the net railway operating income and three on the average market price of the stocks and bonds, produces line 21, which shows the average decrease of 50.52% and line 24 shows that the assessed valuation of the railway property in the State of North Dakota was reduced between 1932 and 1933 assessed values two-hundredths of one per cent.

150 (The document referred to was offered and received in evidence and is included herewith as Plaintiff's Exhibit 20).

Referring to the situation on the Great Northern Railway Company in 1933 as disclosed in the Accounting Department with respect to operating expenses, our hourly wages that we are paying to our employes is now much higher than it has been. In the year 1914, our average wage was twenty-four cents an hour and today and 1933, which is the same thing, the figure is about sixty cents an hour. We have gone through a period in which there was a reduction in wage rates of ten per cent given to all employes. Originally that was agreed upon February 1, 1932, to last one year but that was later extended but with an agreement reached this spring between the men and the managements of all of the roads the ten per cent reduction made two years ago is to be restored gradually; two and one-half per cent of it was restored on the first of July last, another two and one-half per cent will be restored in December and the balance of five per cent will be restored in April of 1935, thus restoring the entire ten per cent cut and putting the wages back to the highest level that they have ever been at in the railroad operations. Due to the industrial code operations, cost of practically all materials is increasing, particularly the dock coal, which is an important element in operating the Great Northern Railway, and the coal that we are buying for next year will be on a decidedly higher basis than the coal which we are using at the present time. All of this coal by the way must be purchased and stored before the close of navigation this season. The restoration of the ten per cent wage reduction will cost the Great Northern about $2,800,000 a year and I estimate
that the increased cost in fuel and other material will
151 be nearly as much, approximately $2,600,000 a year.
There is also the so-called Railroad Retirement Act which has been passed and is now being tried out in the Courts, which if held legal will increase the cost for pensions to the Great Northern of about $600,000 a year. These figures of wages and material increases are based on the volume of business in 1933 and do not make any allowance for a substantial increase in business back to the level of 1931, for example, or 1925 and 1926, which were not peak years but were still much higher than the year 1933 in the volume of traffic.

Based on 1933 conditions, if legislation should be passed at some time in the future limiting the length of trains, limiting the hours of employment to six hours and providing minimum for the number of men employed in crews, similar to requirements in bills which have been actually introduced, they would increase our operating expenses approximately $12,000,000 a year.

In the years 1928 and 1929 our expenditures for maintenance of way and maintenance of equipment approximated $37,000,000 in each of those years. In 1930 they had reduced to $32,000,000; in 1931 to $24,000,000; 1932 to $20,000,000; and 1933 to $16,000,000, compared with $37,000,000 in each of 1928 and 1929. We had a plant that was in excellent shape and we have been living off the fat, if you may call it such, that we had in the property and we have been using up that stored maintenance, so that for the future we certainly cannot hope to continue on the basis of the low level of expenditures for maintenance which we are now experiencing. Some of this drop that I have referred to was due to fewer locomotive and car miles, but in the main part to the decrease on our track and even in failure to keep the equipment to the same degree of maintenance as heretofore, which can be accomplished by setting aside the cars that become in bad order and using other cars as there is an excess car supply, I say that that
152 using up of stored maintenance cannot be continued and there must be an increase in the sums allotted these two departments in future years even if the volume of business is to stay where it is today; which I sincerely hope it will not.

If we had not had any stored up maintenance in 1928 and 1929 to draw on in 1931 and 1932, and if we had had to expend the normal amount that the volume of business in the later years would call for, the net railway operating income of the company would certainly have been wiped out completely in the years 1931 and 1932 and would have been very materially reduced in the former years. It was only a little over a million dollars in 1932 even with the depressed maintenance expenditure.

Referring to Mr. Beidelman's estimate that under normal business conditions in the future, the Great Northern Railway Company will earn a gross annual revenue of $86,000,000 a year, Mr. Beidelman detailed at some length methods which his department go through to prepare revenue forecasts and I might say that the accounting department and myself personally is responsible for the development of the net figure in advance after the revenue forecast has been made. In other words, from the trend of costs, present and expected, I am expected to make an estimate as to how much net will be left from the gross, which Mr. Beidelman's department estimates, based on the present situation without regard to the passage of any other legislation. My estimate would be that out of the $86,000,000 our expenses would be at least 72% thereof, that is the so-called operating ratio; in fact I think it will be

somewhat higher than that, but I will be conservative and estimate that 72% of the revenues will be taken up by
153 the expenses. That is less than the other railroads in the United States are doing today, but the Great Northern is a somewhat lower cost railroad than many other railroads. Allowing for $8,000,000 for taxes, which is very little more than the present figure and may well be much more than that, and $2,100,000 for equipment and joint facility rents, will produce a net railway operating income for this average or normal year with an $86,000,000 gross, a net railway operating income will be produced of $14,000,000. If this $14,000,000 were capitalized at 7% a system value of $200,000,000 would be indicated, and North Dakota's proportion on the basis of 11.71% which I have developed on Exhibit 12, would be a $23,500,000 value and on the basis advocated by the state of 18.25% the North Dakota value would be $36,500,000. If a lower rate of capitalization than 7% were used those figures would, of course, be correspondingly increased.

As to what would be the effect upon the capacity of the Great Northern Railway Company to function as an interstate carrier if compelled to pay the $600,000 of taxes which it alleges in its complaint to be illegal, such a payment would interfere seriously with important financing and would also prevent the making of much needed improvements. There are many things that could be done to reduce our operating cost if the capital were available, but considering the prohibitive price of capital and the impossibility of getting it for a road like the Great Northern, it is out of the question to make those improvements. Any decrease in the small net existing now to the extent of $600,000 would certainly affect adversely the credit of the company and its ability to continue in business for it is reaching the point where it is a question as to where the funds are to be provided in order to stay in business. We have not earned the bond interest for the last two years and will not earn it this year.

154 Cross-Examination.

By Mr. Shaft:

The first objection which I have to the method of allocation of the revenues of the railroad to the State of North Dakota is that sufficient emphasis is not placed upon cost so far as interstate revenues are concerned. The method that I have adopted does not assume that all parts of the system are equally profitable. It is based on the statement of Mr. Beidelman, supported by the fact that the Interstate Commerce Commission and the Railway Company in making the rates

on this interstate traffic has made allowance for the higher cost in one territory than another and, therefore, has built up a laminated rate, North Dakota being in the lower cost territory. I am not stating that all interstate freight rates are based upon this laminated rate structure but that the total value of the interstate rates must in the long run provide for the cost of operation and the return upon the investment necessary to give the transportation service covered by that particular movement. There is no shipment passing through North Dakota that is not affected by this terminal consideration which makes for a lamination. I do not know as to every particular shipment whether the laminated rate structure fixed by the Interstate Commerce Commission applies. Probably 20% of the interstate business in North Dakota consists of shipments from North Dakota to Minnesota. In the case of shipments of grain from North Dakota to the docks at Duluth or Superior, the basis of my computation is on the assumption that the rates provide for a return on the investment plus the cost of giving the service. If that were not so, we could not continue in business. I am not saying that that is true as to every individual shipment
155 between every two points. The rates in the aggregate do not produce any such return as 6% and I have not based my computations on that assumption, but have based them upon allowing the return which the rates actually would permit the company to earn. On a shipment from North Dakota into Minnesota within the same zone you do certainly have in that rate and in every rate, an allowance made for the terminal service separate and distinct from the line haul service just as much as though it were set out as a separate factor in the tariffs, which it is not, but the fact that the rates do not progress on a mileage basis, that is, the movement of two hundred miles does not cost double the movement of one hundred miles for that commodity, and every rate proves that there is an element added in there for this terminal service and to that extent there is a lamination there. Of course, there would not be three zones if you were only moving through two states, but I do say that the Interstate Commerce Commission and each state commission are watching the rates to see that the public pays no more than what is fair and that by the large each rate and every rate will provide for the cost of service and a fair return, which is not only basically sound but is written into the law of the land. There are many rates on transcontinental commodities which do not approximate a fair return on the investment because of competitive conditions and North Dakota is participating in practically all of the transcontinental movements to a

larger extent than they are with these movements that you refer to that originated or terminated within the state. There is a small percentage of North Dakota interstate business which comes from the east and terminates in North Dakota, but it would be much larger than the percentage of
156 goods distributed in North Dakota coming from the west.

Each and every rate is not exactly scientifically fixed upon the basis of the cost of operation plus a reasonable return on the investment, but by the large they do give some return in an amount in excess of the net cost of operating the railway, as is evidenced by the fact that we are earning a net even in the poorest years though it may be little. It is true of movements through every state including North Dakota that we are able to earn this net because the rates for goods moving through the state are sufficiently in excess of the low cost of operation to give a substantial profit on the business. I I do not believe it is true that we make a greater profit in North Dakota per mile than in other states particularly western states. This is shown by the fact that the figures on Exhibit 12 show a smaller percentage of the net assignable to North Dakota than either the miles of road or miles of track basis would produce. In other words, the net revenue per mile of road or per mile of track is less in North Dakota than it is on the balance of the system. I am referring to the net which I have produced by the method which I have followed in Exhibit 12, which reduced the revenue assigned to North Dakota as compared to that reported to the Railroad Commission by about 11%.

Our protest against the method of assigning earnings on a mileage basis was made to the Board of Railroad and Warehouse Commissioners I do not know whether we have protested to the State Tax Commission. My business has been largely in connection with cost of service analyses, both for rate purposes and for the use of the management, and the general mechanics which surround the operation of the railroad.

157 If a through rate is fixed for a given commodity shipped in interstate commerce through North Dakota, North Dakota will produce a greater profit per mile of haul than the other states, if you assign the revenue on a mileage prorate. If you assign it on a proper basis that will not be so. The cost of carrying the train or a ton of freight a mile in North Dakota is less than it is in most of these states. The price that the shipper is paying is not the same for the move-

ment in North Dakota as it is for the other higher cost states, and if it were not for those higher cost states the shipper would be paying a smaller revenue, and, therefore, your assumption is fallacious when you assume that a shipper when he buys transportation from Seattle to Minneapolis pays the same amount for every mile that that shipment moves in North Dakota that he does for every mile it moves in the State of Washington or any other state. It is certainly clear that the movement of a mile in the state of Washington, for example, over a grade which would involve a lifting of that ton of freight fifty feet to the mile is more valuable to a shipper than moving the same ton in the State of North Dakota on a level grade. His problem is to get the shipment from origin to destination. It is true he pays a through rate that nobody says what part of that goes to every state through which it passes and our problem is to find what part does go to North Dakota.

Taking a commodity which is being shipped from Seattle to St. Paul with a rate fixed upon a competitive basis with the Panama Canal, what the shipper wants is to get his goods from Seattle to St. Paul. We do not have to reduce the rate to St. Paul because of water competition but if
158 the movement was to New York as a general proposition we would. I do not know whether that rate would be based on any laminated rate structure. We know that any and every rate is based on someone's judgment that it is delivering some net to the system over operating cost or the rate would not be made. This is absolutely true in all cases. It is against the law to quote a rate that is less than the cost of handling the shipment. As a practical matter, we do not make rates for less than the cost of handling the shipments. This competition that we have with the Panama canal still enables to make money beyond the cost of operation on transcontinental shipments. A shipment made from Seattle to St. Paul would not have the rate figured on a mileage basis. Practically no rates are based on an absolute mileage basis, that is none in which rates are doubled with mileage or anything like that. The minimum below which you cannot go is a rate that is sufficient to pay the cost of handling plus some return on the investment. The rates are not different for different railroads, but the costs of operation are not all the same.

My proposition that rates must pay expenses, plus a reasonable return on the investment is true because rates are not made by an individual railroad where there is more than one line involved. They would be fixed by joint conference

and sufficient to pay the expenses of all. The return might be less on a poorly managed railroad, but it would be in excess of cost.

The rates from a city in the west served by the Northern Pacific and Great Northern to St. Paul would be the same regardless of the efficiency of operation of the two lines.

If one railroad lost money on the shipment, it would be unlawful because you would thereby be throwing a
159 burden upon the transportation of your other commodities and have the ground work for a rate case which would bring about a readjustment of rates. These rates are not fixed arbitrarily by the management but are being examined by every railroad commission and the Interstate Commerce Commission. These Commissions make adjustments upward and downward from time to time if the examinations disclose that the rates are not correct or would not produce a reasonable return. I have never contended that the rate structure is a precise, exact or scientific result of the actual cost of operation plus a reasonable return, but my position is that they are in excess of the cost of operation and yield some return. As to whether there is any class of goods which produces a loss, I have not made a study of every class of goods that moves through every mile of the Great Northern Railway, but I admit that it is not as exact as fixing a measure for taxation purposes, but I do say that the Commission has a minimum rate level in mind and will check you not only for making rates too high but for making them too low, and I have been in cases where the Commission has denied the right to cut rates.

In making rates for products from North Dakota to Minnesota, the rate-making bodies make the rates just as low as they think they can and stay out of court. It is an evolution of a structure which was put in by the carriers years ago when the country was building up and has been modified by the carriers and the Commission from time to time as circumstances arose or demanded revision.

I do not say that you can assign to any state exactly the share of hauling an interstate shipment through that state to the last dollar and cent, but I do say that you can do so as a practical matter, and I have done it in Exhibit 12. The only items of expense on Exhibit 12 that have been
160 assigned to North Dakota on formula are a small item of equipment rents and joint facility rents which are about 3% of the total. For fuel for locomotives I assigned the fuel consumed by the locomotives operating in the state

which is specifically labeled and ear-marked for the specific locomotive which it is used for. A fuel ticket is issued giving the locomotive number, the date, and the run of the engine and the cost of the particular fuel. Where an engine runs west from Williston into Montana or crosses any state line, the entire fuel consumed on the run is divided on the basis of the miles made in each state.

Train supplies and expenses include several items which are apportioned on different bases. Lubricating of cars which is probably the principal item, is assigned to the State of North Dakota on the basis of the car miles. The engine house expenses is the expense of the particular engine house located in the state of North Dakota and North Dakota gets no share of the expenses of engine houses located in other states.

Engines used in North Dakota are sometimes housed in engine houses outside the state and engines used in other states are housed in North Dakota also, but there is a 400 mile operation in the State of North Dakota. The biggest portion of our engine terminals and at Grand Forks and Fargo where the end is on the state line and at Williston where it is 10 miles from the state line. When you take the fuel on an engine from Williston west and assign fuel for 10 miles compared with the total length of the movement, you assign two or three per cent. on the basis of that mileage prorate, and 90% that is consumed by engines that are operated entirely within the State of North Dakota.

Where we haul 100,000,000 net ton miles of company freight outside of the State of North Dakota for the benefit of North Dakota operations, the cost is not added to
161 the cost of service in North Dakota but is added to the cost of service in whatever state the movement occurs in. It is not added but it is there already and it is not taken away from those states. It is a part of the cost of operating the system in Montana.

I do not know of any situation which affects the State of North Dakota, similar to the absurd result produced by allocating the revenues from ore shipments between Minnesota and Wisconsin on a mileage prorate. That illustration concerns only Minnesota and Wisconsin. However, if the Mesabi Division operations had been eliminated from the system operations, both the revenues and the expenses, the assignment to the State of North Dakota would be smaller than I have found on Exhibit 12, and by leaving that movement in the states outside of North Dakota, I have to

that extent favored the State of North Dakota. I made the illustration of the absurd result produced by using the mileage prorate on a shipment of iron ore to illustrate the errors of the mileage prorate which exist in all mileage prorate ascertainments to a greater or less degree. I know of no other instance where it is evidenced to such a marked degree as we have no other traffic that moves in such volume between two terminals.

I stated that we made our report to the railroad commission on the basis of the mileage prorate under protest. I did not say that there was no law or rule of any rate-making body which required the report to be made upon that basis. The State of Minnesota makes the taxation of railroads on a gross earnings basis and prescribes that interstate revenue be assigned to Minnesota on the basis of a mileage prorate. Being compelled to make that computation for the State of Minnesota where we have the largest ton miles on the system, we have continued that method to other states and have determined our interstate revenue on that basis. Many other railroads do the same thing and many do not. I know of one large railroad operating through the
State of North Dakota that does not follow that basis
162 at all. They take the mileage prorate of the system revenues to Minnesota and take the balance of the interstate revenue and divide it on a mile basis regardless of cost and determine the same in the State of North Dakota and the State of Washington and the State of Idaho and every other state that they operate through just as a means of putting a figure in the report.

I do not know of any other railroad which uses the method which I have developed in Exhibit 12. It has been talked of for years—as much as eight or ten years ago I worked out a distribution of revenue on that basis and introduced it as an exhibit in some rate cases. It has not been gotten up overnight for the purpose of this case. No state has ever raised any question as to the assignment of interstate revenue to that state by the average revenue per ton mile basis or any other method. In fact the statistician for one of the other railroad commissions testified that the carriers were at liberty to state any figure they wanted in that column no matter what it was. That was Mr. Bitney speaking for the state that already compelled you to keep the mileage prorate for taxation purposes. He testified that that did not bind you as to what you should report to the railroad commission and that you could report the interstate revenue on any basis you saw fit. These reports to the railroad commission

are matters of public record and are put on the shelves in the commission and very little use is made of them thereafter so far as the interstate revenue is concerned.

I have never appeared before a tax commission and do not know who has appeared and do not know what basis they have used, but so far as I know, they have never at-
163 tempted to use the method of allocating gross revenue among the states which I have followed. I never prepared figures on this basis for my tax department until August, 1934. I did not present similar figures for any other states.

The application of my method of computation to the State of Washington would not produce a great increase in our taxes in that state. They work up a five factor formula similar to the one advocated by the defendants in this case and then, finding that it assigns to Washington little or nothing, as is necessarily the case when revenues are assigned on a mileage prorate, they throw the figures out of the window and say that they have no probative value and that we will assess you three or four times more than those revenues show, so that the State of Washington now pays no attention to the five factor formula. The assignment of interstate revenues on that formula shows that Washington is not even earning its operating expenses in any year and could, therefore, have no value on the theory advocated by the defendants in this case. We have the situation that the state which has an advantage from the formula uses it while another state where the factor would show that the property is worth less than nothing says that the formula is worth nothing.

I have never advocated that the method of spreading revenues on a mileage prorate should be applied to Washington and even if I had, it would have been given no weight by my listeners. I do not know what the carriers have advocated in their appearances before the various tax commissions.

The formula which I said was thrown out of the window in Washington is the formula which the state is advocating here, the five factor formula which would give a figure of about one-half of the assessment made in Washington. I do not know what our railroad advocates out there or
164 whether it has advocated the system developed by me in any other state except North Dakota. I do not know whether North Dakota is the state which would receive

the greatest blow by the use of my formula. I would be surprised if it would not result in a very material reduction in Montana, but the State of Washington is already assessing on a basis practically what would be developed with a system such as this. I do not know about Idaho as we have only 100 miles in that state out of 10,000 miles of operation.

If a smaller percentage of our gross revenues is given to North Dakota necessarily a large percentage must be given to other states. Washington would get a large share of it, because on the mileage prorate it is not even earning its operating expenses. When a system earns less gross in states like Washington and Wisconsin on the mileage prorate than the actual operating expenses, it is clear evidence to my mind that there is something wrong with the system. So far as I know, our railroad has made no attempt to promote its use in any other state than the state of North Dakota, although I do not know what they have used. I prepared the figures for the North Dakota brief but have not prepared any similar figures for briefs used anywhere else.

I prepared the figures for North Dakota about the latter part of last year or the first part of this year and subbsequent to August and September, 1933, when the 1933 North Dakota assessment was made. We got such a shock when we got that assessment that it was evidence there was something radically wrong with the situation and began to look into it to find out just what the difficulty was.

I did not develop this theory for the express purpose of using it in this lawsuit or in fixing future North Da-
165 kota taxes. I developed and used it ten years ago. I have used it for the purpose that I am using it here, to assign interstate revenues to the various states through which the traffic moves in identically the same method that I have used it here for the purpose of developing the net earnings by states. I have not attended any tax hearing and have not used it in tax hearings and have not prepared any figures on that basis for any tax hearings before the 1934 hearing.

Referring to Exhibit 13, the reason for the larger number of tons of revenue freight originated per mile of road outside of North Dakota is very largely the enormous amount of iron ore tonnage shipped on our Mesabi Division which is a shorthaul shipment of relative low class freight, although very profitable freight.

The ore movement in 1932 was at a lower level than in any year since 1893, so it cannot be taken as indicative of the

future we hope. If I used any other state on the entire system, I would get the same result so far as the 1932 comparison with 1930 is concerned. The origination of that shorthaul iron ore freight makes our system average higher than the average of any state except Minnesota.

Exhibit 15 showing freight revenue per revenue net ton mile covers only intrastate traffic. I have not made a similar computation as to interstate traffic because the interstate traffic is divided in our reports on this erroneous mileage prorate. I do not contend that the actual relative situation between the states is as shown on this exhibit, because there are different commodities and different length of haul, but I do say it is an indication that the state commissions themselves who are setting out to make as low rates as they can justify for the benefit of the public, recognize the
166 higher cost in other states, and this exhibit which shows the revenue on the intrastate freight traffic only indicates that to a certain extent, not to the degree as shown on that exhibit.

I would not say that local boards of railroad commissioners do not have much to say about rates any more. We have thought they could go pretty far in the matter. Intrastate rates like other rates have been developed through a series of years and findings of commissions have increased or decreased them from time to time.

The revenue per ton mile has steadily decreased during the past few years. It has not been increasing. It increased, I think, in the year 1932 due to the absence of this iron ore traffic and that alone, but that does not alter the fact that the general level of the rate per ton mile on each individual traffic considered alone has been decreasing. The short iron ore movement in 1932 effected an increase to the system because the ore moves at a rate lower than the average revenue per ton mile for the system.

In 1928, our revenue per net ton mile was $.01027. In 1929 it decreased slightly to $.00997. In 1930 it was $.00984, in 1931 $.01030 and in 1932 $.01063. From 1930 to 1931 the revenue from iron ore dropped from $9,976,000 to $4,700,000, less than half and in 1932 to $608,000, while in 1928 the revenues from that traffic were much in excess of $10,000,000. The fact remains that our revenue per net ton mile in 1931 and 1932 was in excess of the years 1928, 1929 or 1930. The revenue per net ton mile on this iron ore traffic is ten to fifteen per cent. of our total revenue and has a revenue per net ton mile of six or seven mills compared with about 1c on the rest of the traffic,

so that the disappearance of the six or seven mill traffic naturally raises the average without, however, indicating
167 that the rates are being increased on the traffic as a whole.

This iron ore traffic is the same traffic which I was using in the previous exhibit to show that North Dakota did not originate as large a share of the revenue traffic as the other states, and that revenue is probably the most profitable revenue on the system, even at the low rates, because of ease of operation.

You cannot deduce from a consideration of gross revenues that North Dakota mileage is more profitable than it used to be in proportion to the system. You are talking about gross revenues and conclude that North Dakota is more profitable because we have eliminated a low revenue commodity, which, however, is more profitable than anything handled in North Dakota and the elimination of that traffic has not increased the net profit on any business from North Dakota or made the property any more valuable.

My Exhibit 12 does not show that the loss of that traffic in Minnesota increased North Dakota's percentage of the business, and that exhibit is worked out on a correct determination of all the factors as they actually existed, eliminating the iron ore traffic when it was eliminated. You cannot argue from revenue per ton mile as to the profitableness of the business.

I testified that during the last several years we have lost a very valuable source of revenue in Minnesota. I would concede that possibly that increases the percentage that was assignable to North Dakota and my Exhibit 12 shows that in the year 1932, the percentage assignable to North Dakota was more than in 1931. I am referring to the percentage of system net earnings in North Dakota.

Referring to Exhibit 17, I stated that our bonds commanded a higher yield in 1933 than they had before or since.
The yield to maturity which was demanded in 1932
168 showed the value that the investors were putting on the property at that time and under the conditions which then existed and at the time when the assessment was being made that is at issue in this case. In 1933, all investments were affected with panic psychology but that situation did not exist in 1932, and we had practically the same figures then. Certainly, the panic psychology in 1932 did not exist to the extent that it did in 1933. I would say that that difference is reflected by the difference in my percentage. It is

a reflection of our decreased earnings and if it had not been for the past record of performance, the yield to maturity demanded would have been still higher. That yield is lower because of our past record of earnings and not because of the instant earnings. At that particular time, nobody would be willing to take 11% on his money for property like the Great Northern that was not then earning bond interest. The earning capacity is higher now than it was in 1932, but we are still not earning our bond interest. I would not say that the picture for 1932 was convincing evidence of the future value of the railroad.

As far as the market value of securities is concerned, my opinion is that the current year's figures are the most reliable evidence of the value of the property at that time as an index of what the public is willing to pay for the securities of a corporation considering all its past history and all its future prospects. When investors pay $20 a share for Great Northern stock which has not been paying dividends for some years, the price is based on what they hope to get in the future. While that is the general rule on a normal market situation, I think that in the abnormal situation that existed in
1932, you might be justified in going back three years.
169 I do not think you would be justified in going back four
or five years to a level that was above anything that we had before and, from Mr. Beidelman's testimony, way in excess of anything we now expect in the future.

Even if a five year period had been used in the past, I do not believe that the perpetuation of an error adds anything to accuracy.

I said yesterday that a company with steadily increasing earnings has more prospective value than one with steadily decreasing earnings even though their five year average earnings are the same. The long time result of using the five year period or one year period would not be the same. Heretofore in using the five year figure, there was small variation from year to year and if that were true in 1932, I would say the use of the five year figure was all right. There were increases and decreases but nothing like what we experienced from 1929 down to 1932 which was unprecedented. Using five year averages heretofore when no error resulted is no reason for using them now when error does result.

The value that people are putting on their stocks and bonds is dependent not only on the present value but on the past performance and anticipated future of the company. The prices paid in 1930, 1931 and 1932 were influenced by the

high prices of 1928 and 1929, so by using a five year figure, you get a cumulative effect put on the large earnings of the fourth and fifth previous years.

There was a general increase in our stock and bond values from 1925 to 1929. There was a boom in 1928 and 1929. I would not say that purchases of railroad stocks were made on a speculative basis and not on the basis of actual expected earnings. Railroad stocks, and certain Great Northern stock, has not been the medium of much speculative buying because of regulations limiting their profits and requiring them to turn over half of their profits over 6% to the Government and limitations on rates, wages, etc.

170 The fact that taxing authorities in 1929 considered the lower stock and bond values of 1924 and 1925 is not a reason now for giving effect to the higher stock and bond values of 1928 and 1929, because of the extent of the difference between the five year average and the three year average.

My three year figure includes the first three full years after the depression commenced and does not include any time before that.

In Exhibit 20, showing the net railway operating income, I first found the percentage of decrease between the average for five year periods ending in 1931 and 1932, and then between the three year periods and the single years of 1931 and 1932. In all three of them, I have taken into account the decrease which occurred in the year 1932 and found that they average 52.73%. In the bottom table on the same exhibit, I did the same thing with the average market price of stocks and bonds except that I used a three year period, a two year period and a one year period and took the average of those three.

There is a material amount of mileage traveled in a terminal for which no credit is given on the mile haul of the road. The purpose of these terminals is to furnish efficient loading and unloading facilities. In loading and unloading freight at any town along the line, there is movement back and forth which is not counted in the mile haul of the freight, but the movement in an intermediate station where there is no switch engine may be 200 ft. and is not at all analogous to a movement in a terminal like Minneapolis and Seattle, where the movement would be four or five miles. You do not move the whole train around to take out or put in one car, but simply cut that portion of the train that has the car to be set out.

171 It is not a fact that it is cheaper to load or unload at a terminal than at a prairie station. Because in a terminal, the car is handled by sometimes four or five different switch engines and spotted for loading. Where we don't have the switch engines, we use the locomotive attached to the train because the volume of business does not warrant a switch engine and it is a shorter movement. Every car that is loaded or unloaded at a country station has to be cut out of a train or put into a train.

I did not discuss any unfairness in combining car and locomotive mileage. I believe that as a general proposition, the average cars per locomotive mile is larger outside than inside North Dakota. I have not considered whether it is unfair to combine locomotives with cars in one factor.

I stated that the weight of carloads in North Dakota averaged about 16 tons while they average 27 or 28 tons outside North Dakota. The ore movement has some effect on that but that is a relatively short haul movement so that the weight and number of car miles made in that movement would not be controlling. You can take the year 1932 when there was practically no ore movement and the average load per car for North Dakota is 16.1 tons whereas the average for the system which includes the low North Dakota figure in that year was 19½ tons, and if you eliminated North Dakota, it would be in the neighborhood of 24 or 25 tons.

Agricultural products weigh pretty good, around 42 or 43 tons per car. The low average loading in North Dakota is due to the l. c. l. freight in small loads on branch lines the year round which is not offset by the heavy movement of agricultural products for short periods. This is true all over the system but exists to a greater extent in North Dakota. In a year when the ore shipments are eliminated we find that carloads in North Dakota average 16 tons while the system including North Dakota is 19½ tons.

172 Referring to the shortening of the railroad by tunnel construction, the last tunnel constructed was finished in 1928, but we have had smaller tunnels constructed since then. The 1928 tunnel and grade revision shortened the line 9 miles. When those tunnels were built the snowsheds and the whole investment on the old line was charged off to capital account, because that does not affect your operations. The property retired was written out and the property constructed enters the account. I think the charge in that case was made to profit and loss on the tunnel.

Referring to the effect on our credit if we have to pay this extra $600,000 in taxes, the facts are that the Great Northern is living on borrowed money right now and if we pay out this $600,000, we would have to borrow $600,000 more and the more you borrow the harder it is to borrow and the higher rate you will have to pay, and it would increase the difficulty of borrowing the necessary sums to continue operation. Having to pay this extra $600,000 would not mean that we would be forced to go out of the interstate railroad business. I hope we could still squeeze another $600,000 out of somebody, but I don't know where. There are lots of railroads in worse shape than ours and still operating and lots in better shape. The Great Northern never had any floating debt at all until last year and our floating debt is now increasing every year, and if we did not borrow money we would be out of business.

The figures in my exhibit 12 which are taken from the reports to the Railroad Commissioners of North Dakota may be shown in the reports to the State Tax Commission, but I am not sure. Some of the figures are shown as taken from reports to the Tax Commissioner, but to the best of my knowledge, these figures are reported only to the Railroad
173 Commissioners and certain other figures in Exhibit 12 are ascertainable only from the current records of the Great Northern Railway Company. There are about 2 cases where the basic data is not shown in the reports to the Railroad Commissioners or Tax Commissioner of North Dakota. One case covers the interstate revenue which is reported to each state, but the sum of that amount is not shown in the North Dakota report.

I am not challenging the good faith of the North Dakota Board of Equalization. I did not say that they would be thinking up a tabulation of this kind themselves if it had not been presented to them.

Redirect Examination.

By Mr. Dorety:

Our report to either the North Dakota Railroad or Tax Commission show the number of ton miles and operating expenses in the state and reports to the Interstate Commerce Commission show similar figures for the system. From these figures you can compute the cost per net ton mile for North Dakota and also for the balance of the system, and they would indicate a lower cost and less dollars of service per mile in North Dakota than on the balance of the system. The report that we make to the North Dakota Railroad Commission

includes the report to the Interstate Commerce Commission which covers the system operation and also certain schedules applying only to the state of North Dakota, so that the sytsem figures and the North Dakota figures are both in the report to the North Dakota Railroad Commission.

The figures for cost of reproduction less depreciation are reported to the North Dakota Tax Commissioner but not to the Railroad Commission. If it had occurred to the Tax Commissioner or Board of Equalization of North Dakota to inquire whether an allocation to North Dakota on the basis of track miles, car and locomotive miles, ton miles, etc. was excessive, or rather whether that sort of an allocation exceeded
an allocation based on dollars worth of service per-
174 formed, and if you also assume that they had available the reports of the Railroad Commissioners of North Dakota, it must have been apparent from the figures which they had that an allocation based on dollars worth of service performed must have been less than the allocation which they were using. I do not mean that they could make the same computations that I have made, but they could get the indication just as I have the indication.

I would not say that my method of apportioning interstate revenue is applicable in any greater or different degree to laminated rates which are the specific and direct result of applying two or three layers of established scales than to a through rate which is not so constructed, but which is merely the result of estimating the cost of performing the service plus a return on the plant used. Whether these rates were in fact made by the laminated basis or not, they are in effect made on that basis. A transcontinental rate which because of the higher cost in Washington and terminal costs might admit of a rate no less than 65c a hundred which would be sufficient to cover cost and some return, whereas if we did not have the higher costs in those states and had the same costs that existed in North Dakota, it would be possible to make a rate of 55c or 50c and, therefore, the additional cost in effect is in every rate whether it is so set forth as a separate item or not and gives every rate the effect of a laminated rate.

The Court: May I inquire just one question here that I am not clear on what the contention of the plaintiff is. Without regard to how the rate is constructed, whether by laminated process or not, the result necessarily is in the rate, is it not?

A. Yes, sir.

The Court: For taxing purposes what difference does it make whether it is laminated or not laminated?

175 A. It does not make any difference except when they use the mileage prorate of interstate freight revenue to assign to the State of North Dakota and thereby take into the State of North Dakota some revenue that belongs to the State of Washington because the costs in the State of Washington were in effect included in the rate as made. We cannot make a rate that is less than cost plus a return. The fact that we have higher costs in Washington means the rate is higher than it would be if we had the same conditions that we have in North Dakota. Our contention is that a method that takes revenue from the State of Washington and leaves that State without sufficient revenue to pay its operating expenses and a proportion of a through rate that is passing through North Dakota and assigns to North Dakota a revenue that pays its operating expenses and two or three times the return on the property in North Dakota that the system is earning is a fallacious method of distributing revenue.

The Court: Of course, I only asked you the question for information, but the thought is running through my mind the cardinal principles involved in a tax case, I do not say the sole or only but the cardinal, was the earnings of the property used in the State?

A. That is correct.

The Court: With the value of stocks and bonds capitalized at a reasonable rate?

A. That is correct.

The Court: And with that thought in mind I had some little difficulty in appreciating just what difference the laminated versus any other rate would make as applied to a tax proposition. I can readily see the proposition of the rate making.

176 A. The problem as you state is to determine the net earnings applicable to North Dakota and that is what I have done on Exhibit 12. The net earning is determined by assigning to North Dakota its interstate revenue, what I say is a proper proportion, and a correct proportion of the interstate revenue and charging to North Dakota its operating expenses absolutely incurred within the State and thus determining the net. The whole difference between the figures reported to the Railroad Commission and the figures I have used on Exhibit 12 amount to a reduction of about eleven per cent of the gross assigned to North Dakota and that comes about on the theory that the mileage prorate assigns too much of this through revenue to North Dakota by taking away from

Washington some of the share that belongs in there and taking away from Minnesota some of the share that belongs in that State.

In Column 3 on Exhibit 11 I show 50c per hundred ton miles as the average cost of operating in North Dakota. If the miles in other states were just like those in North Dakota and had no terminals or mountain construction and had the same cost in North Dakota which would give Washington a cost of 50c instead of 95c, a rate of $378.00 on this particular shipment would pay the cost plus a fair return. If that assumption were correct and if the entire rate were $378.00, North Dakota's share of the total earnings on my method of allocation would be exactly the same as it is in Exhibit 11. If we had equal conditions per mile both as to operating and plant and had a rate just sufficient to pay the operating expense and return on the investment, my method would give North Dakota in interstate revenue on that shipment exactly the same that it gives under actual present operating conditions.

177 The fact that instead of showing a rate of $378.00 on Exhibit 11, I show a total rate of $480.00 is due to the higher cost in the states other than North Dakota. The difference between $378.00 and $480.00 or $102.00 is solely and entirely the effect of the higher operating costs and more valuable plant in the other states and that is the sort of thing that I have been referring to as a lamination. If we put that lamination of $102.00 onto the rate in order to cover the costs in other states, and then spread the entire rate including that $102.00 over North Dakota on a mileage basis, the effect is to give a revenue in North Dakota of $106.67, when in fact the cost in that state and the amount included in the rate for that cost was $84.00.

If the mileage and the costs were alike in all states, and if the total rate were, therefore, $378.00, North Dakota's share of that $378.00 would be $84.00, whereas the mileage prorate as shown in column 8 gives North Dakota $106.67. The additional $22.67 is a portion of the extra revenue which is provided for extra costs in other states.

Referring to the iron ore lines, if a total rate were established which would pay all of the Minnesota costs plus all of the Wisconsin costs plus a return on the investment in both states, and if that resulted in a dollar rate which could pay a fair return upon the total investment of $32,000,000 in the ore lines, and if the question then came up in a tax case as to how the $32,000,000 would be apportioned between the two states, or how the revenue should be apportioned, and if the sugges-

tion were made that for tax purposes, every mile is equal, and if that suggestion were carried out for tax purposes, the State of Minnesota would take 90% of the gross revenue to apply to 50% of the cost and 50% of the investment while Wisconsin would have 10% of the gross revenue to apply to
50% of the cost. The result would be that of the $32,-
178 000,000 total value, approximately $25,000,000 would
be assigned to Minnesota and $7,000,000 to Wisconsin, when in fact there is actually $16,000,000 worth of property in each state used jointly for the transportation of this commodity.

If it be assumed that the entire 100 miles were worth $32,-000,000 and if it were also assumed for the purposes of a tax case that each mile was equal, because the entire rate paid the same rate of return, that would give the same value per mile in each state or each mile would be worth 1/100 of $32,000,000 a mile. If the Wisconsin portion were to be taken over by a separate independent corporation, I am sure the original owner would not sell the Wisconsin portion which cost $16,-000,000 or a million dollars a mile for a price of only $320,000 a mile.

The same situation as to the errors of a mileage prorate which exist on the ore lines also exist in principle on the North Dakota-Minnesota traffic where the heavy expense of the Minnesota terminal operation is disregarded in making the mileage prorate of revenue. It is the same principle but different in degree and this same principle applies to every interstate shipment moved everywhere on the system.

The fact that in Exhibit 12 I have prorated small amounts of expense between North Dakota and adjacent states on a mileage prorate is not inconsistent with the contentions that I am now making. In the case of train operations between Williston and Havre, the same tonnage and the same cars are handled throughout the entire district, the wages paid are at the same rate, the operating conditions are similar in general and a mileage prorate of a cost where the operations are homogeneous, as they are in that movement, is not doing violation to any of the facts in the case. If costs were the same
all over the system for handling traffic, the mileage pro-
179 rate would be all right for handling revenue and would
give the same result that I have reached. If the 50c operating cost in North Dakota as shown on Exhibit 11 existed likewise in every other state, so that the through rate shown on this exhibit would then be $378.00, I would then see no objection to the use of the North Dakota allocation formula

in tax cases. You could get the same result out of the mileage prorate as you would get out of the system I have employed. I am criticizing the state's basis of allocation only when applied to a railroad which is not homogeneous.

If the $480.00 rate which I have shown on Exhibit 11 and which pays 4% were forcibly reduced because of Canal competition until it paid only 1%, so that instead of being $480.00 it would be perhaps $420.00, the comparison which I have made in Exhibit 11 between the mileage prorate and the prorate based on dollars worth of service performed would still apply. The same criticism would apply to the mileage prorate because the effect of the higher cost in the other states would still be in the rate and operate as a barrier below which the rate could not be reduced, whereas, if the costs were the same as those in North Dakota, the rate would be lowered still further.

Recross Examination.

By Mr. Shaft:

Referring to the grave injustice of applying the mileage prorate of gross revenues on the Mesabi Division in Minnesota and Wisconsin, that method of prescribed by the statute for determining the amount of taxes to be paid to the state. There was a time when there was a separate portion of the taxes and separate rates paid and that is not true at the present time, and for 15 years past. There is a separate rate for the dock service that goes to Wisconsin and the balance is prorated, but that injustice still exists there to a certain extent.

180 Referring to our railroad running past and serving all of those mines in the northern part of Minnesota, I would say that the value is dependent upon the net earnings of the property and not upon the cost whatever that might be. We have no monopoly on that traffic. The D. M. & N. serves those mines, some of them on the same tracks that we use, but the whole value of the plant is dependent upon the net they can produce. In 1932, when we did not have any ore, that property was worth less that what it cost that year. It depends upon your net which when capitalized might be more or less than the cost.

Referring to these laminated rates, I would say that the zones are fixed definitely with reference to the cost of operation. I do not say that the rate of lamination is exactly the sum of the cost.

Assuming that one of the zones commences at Leeds, N. D. and goes west, I would not say that there would be a great

deal of difference between the cost of operation between Leeds and Grand Forks and between Leeds and Minot. It runs through practically the same kind of territory without mountains if you stop at Minot, but not if you go to Williston. The route from Minot to Williston is a very costly operation. It is the most costly operation in the state of North Dakota and is more costly than eastern Montana. That is because of a heavy grade and in the Badlands. There is a 1.72 grade in that vicinity and it is so bad we have a separate engine run for that 127 miles and in the next territory west we run 300 miles.

I do not say that the rate schedule is precise or exact but is just an indication of situations.

Referring to a rate on transcontinental traffic which has been reduced by Panama Canal competition so that it produces a 1% return on the investment, the object of that
181 transportation is to get goods from the west coast to the east coast. We get rate from one and to the other. Over some portions of that route it is very costly to carry the goods and over other portions it is cheaper. North Dakota is one of the cheaper portions. It is not a fact that it is more profitable to haul such goods over North Dakota mileage than outside mileage. I think the rate is built up to include the higher cost in the other states and that if the North Dakota situation existed throughout the system you would get a still lower rate but your net would not be any more. We don't get that lower rate because of the high cost of operation in the west but we get the same net on this business. Profit is determined by subtracting the cost of operation from the income. The income from operation in North Dakota on a shipment from which the rate is fixed on a competitive basis does not give a bigger spread in North Dakota than it does in other states.

Our railroad and the Northern Pacific compete for the same transcontinental business and have approximately the same terminals in the Twin Cities and on the west coast, but the cost of operating the two railroads is not identical. Nor is it identical in any state along the route. The Northern Pacific take a route quite a bit to the south of ours, but the Great Northern uses the lowest mountain passes. The rate on a shipment of freight from St. Paul to the cost would be identical on both railroads, but the cost of carrying it per mile would be different and would probably be different in each state along the route. In fixing minimum rates below which you might not go, the Commission usually figures the cost by

all the roads that will handle the traffic. If the rate is above the minimum, it simply means that each one is getting a varying percent of profit. They use the average cost of that haul as a measure and then they have a certain prescribed
182 minimum below which they will not go no matter how low the costs are.

I think it is probably true according to Mr. Bowen's map that a shipment of freight would go a good deal further in going through Montana by way of the Northern Pacific than it would by way of the Great Northern, and you could assume that the cost of operation per mile would be approximately equal.

My formula would produce different assignments to North Dakota for the Great Northern and Northern Pacific, because the Northern Pacific's net earnings on their system are different from ours, which is equivalent to saying that the earnings per mile or per dollar invested in North Dakota is different for the two railroads, and I think that is true, but my system would show what would be correct for the Northern Pacific just as it does for the Great Northern.

My system does not assume that earnings are exactly proportionate to cost but that the general level of them must necessarily cover the cost in order to permit you to remain in business and that no rate can be made below a minimum that will not give you some return. My system does not assume that costs and earnings are constant in their relation exactly. If you were to take your total earnings and break them up on a cost basis, you would get entirely different figures from what I have here. The percentage of cost in North Dakota instead of 11 or 12% I think is around 17%.

My system does not assume that the relationship of cost plus a return on the investment and earnings is constant. So far as the interstate freight is concerned, it assumes that a through rate that is made for the movement of a shipment through a group of states does not give you variable rates of profit or loss in different states on the same movement.
183 That is the basis of the assumption and it is applied only to the interstate revenue and has no application to the intrastate or express or mail revenue or any other revenues.

Redirect Examination.

By Mr. Dorety:

My system assumes that if one state provides a million dollars worth of plant in the form of a tunnel a mile long and another state provides a million dollars worth of plant in

the form of a hundred miles of track, and if the shipment earns 6% on the total, each state should get 6% on its part. It would give the Northern Pacific different credit from the Great Northern in North Dakota dependent on the number of miles of each route in the state and also on the amount of expensive construction. If the Northern Pacific had mountains in North Dakota and a level line in the west, my system would just reverse the allocation that I get for the Great Northern.

Mr Shaft was perfectly right in saying that North Dakota would get more profit than other states out of the through rate on condition that by using mileage prorate you give North Dakota some of the extra earnings that are earned in other states.

(At this point the plaintiff concluded its direct testimony and rested its case.)

LYMAN BAKER, a witness called on behalf of the defendants being first duly sworn, testified as follows:

Direct Examination.

By Mr. Shaft:

My name is Lyman A. Baker. I am a tax specialist and reside at Bismarck, N. D. After graduation from college, I engaged in civil engineering for 5 years and in 1914 entered the employ of the North Dakota Tax Commission where I remained 19 years. I was Deputy Tax Commissioner during the last 13 years, and it was part of my duties to prepare all valuation data in connection with railroads and other public utilities for the use of the State Board of Equalization. I had general charge of all of the tax work in the office
184 in addition to the valuation of the public utility property and have studied and considered the general tax field.

I have attended five or six sessions of the National Tax Association and attended the session in 1923 when railroad taxation was specially under consideration. I am familiar with their deliberations and conclusions. Since January 1933, I have been engaged as a tax specialist independently of the State Tax Commission.

Market value is made the basis of ad valorem taxation under the statutes of North Dakota. The determination of market value as to general property under normal conditions is fairly easy. The value of commodity goods and personal property may be ascertained from local market prices.

The valuation of land is determined on the basis of actual sales of similar property, and the valuation of structures is based on cost of reproduction less depreciation modified by the Commissioner's knowledge of general market conditions.

These methods are not applicable to the valuation of railroad property because that is not bought and sold on the market and special methods have been developed for valuing railroad property.

The principles of valuation that are ordinarily followed have been laid down by federal courts and are the guides which are ordinarily followed in valuing railroad property. The principles are broad in their application and consequently there is some room for disagreement. The first step in the valuation of railroad property is to determine the value of the entire system. There are two classes of evidence ordinarily considered, first the past earnings of the property, and second, the average market price of stocks and bonds over a period of years. It is difficult, if not impossible to accurately determine net earnings by states. Consequently net
185 earnings or the capitalization of net earnings within a given state is an impracticable method of valuation. The stock and bond values reflect value of the entire property of a railroad. Neither the capitalization method nor the stock and bond method afford any basis for making a direct determination of that part of a railroad system within a given state. The past value of the railroad involves the entire property and then apportioning the value to the various states in which the property is located.

Referring to the stock and bond method, market values of the securities of a company under normal conditions results in a composite estimate of the investing public as to the worth of the property. A railroad is seldom, if ever, bought and sold as a unit but it is sold in small fractions and the theory of the stock and bond valuation method is that the value of the whole property may be determined or may be fairly judged by the price of the securities. Under this method the average sales price over a fixed period of time of each class of stock and of each issue of bonds outstanding is found and the average sales price for each class of stock and each issue of bonds is multiplied by the number of units outstanding. The addition of the resulting totals gives the total stock and bond value as reflected by sales during the test period. The valuation so obtained, however, reflects the value of the entire corporate assets of the company and it is necessary to

make a separation of the operating and non-operating property.

This stock and bond method is subject to some criticisms that do not undermine the method as being of very great value. In the first place it requires a fixed period of time over which market quotations shall be averaged and this period of time must of necessity be somewhat arbitrarily fixed. It assumes that the average price of the stocks and bonds actually sold reflect the value of the entire outstanding issues of each, when rarely, if ever, is a controlling interest in stocks and bonds of a railroad company bought
186 and sold on the stock exchange, and where control is sought it is common knowledge that securities advance very sharply in price. The method assumes that the aggregate market value of the stocks and bonds issued by a corporation is the same as the market value of the underlying property owned by the corporation. I think one of the serious defects in it is that it assumes that purchasers of securities act upon an informed judgment based upon accurate knowledge of earnings, past earnings, present conditions and future possibilities of the property. Another defect is that it ignores the influence of pure speculation in the market on the part of those who do not have any knowledge of the assets or affairs of the corporation. Where the common and preferred stocks of a railroad company have paid no dividends for years and where the future outlook is uncertain, it ignores the fact that such securities are purchased as pure speculations and not as investments by permanent investors. It also ignores the fact that the purchase of stock is governed largely by prospect of present dividends and not by any general conception of earning capacity and the purchase price paid for bonds depends upon assurance that the interest payments on the bonds will be made on the due date.

Stock and bond value reflects value of all of the property owned by a railroad company, including both operating and non-operating assets. Since the non-operating assets are otherwise assessed and the duty of the board is to assess only the railroad property it is necessary to make some deduction of the value of those non-operating assets.

The State Tax Commissioner has used a composite method of assigning a value to the operating and to the non-operating property based upon two ratios; the relative book cost of operating and non-operating property is used as one
187 percentage figure and the relative earnings from the two classes of assets for a period of years is used as the other percentage, the two percentages are averaged and

the composite percentage is applied to the total stock and bond value and the resulting amount, for instance, as to non-operating property is deducted from the total stock and bond value.

As to the proper test period for averaging stock and bond values, I think that most taxing boards, economists and in fact most railroad men have always adopted the five year period in order to give stability to the tax value so far as the railroad is concerned and also as far as the State is concerned. As far as the State is concerned stability in assessments are vitally important. As far as the railroad company is concerned it is immaterial whether the five year period or a shorter period is used, as in the long run the total assessment would work out the same.

The depression resulted in a collapse in the stock and bond market. The forced selling that occurred during the recent depression brought stock and bond values down to a figure where in the opinion, I think, of most of the investors it did not fairly represent the value of the property. The purchasing power of the dollar from 1929 to 1933 very greatly increased and this resulted in a very great depreciation in security prices as well as the prices of all commodities. In the United States there was a general movement to convert property into cash, due to a collapse in public confidence, and security prices since 1929 have been extremely unstable. Some of the things that affected the security market were the exportation of gold, the policy of the Federal Reserve Banks, the collapse of a speculative bubble, the freezing of banking assets, the wide-spread failure of banks and the almost total loss of confidence on the part of the public in the integrity of American business managements. In North Dakota, in addition to the general depression, we have had drought
188 and crop failure and ruinous prices for agricultural products, and from 1929 to 1933 the extraordinary rise of the dollar in relation to commodity prices resulted in a universal rush to convert securities and other property into cash. The forced sale of securities, the deposit of collateral for bank loans aggravated the decline. As an illustration of what happened Dow-Jones & Company averages of thirty industrial stocks fell from 383.17 in September, 1929, to a low of 41.22 in July, 1932, and the average of twenty rails fell from 189.11 in September, 1929, to 13.23 in July, 1932. The total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and one-half billion dollars in September, 1929, to fifteen and one-half billion dollars in July, 1932.

Despite all these objections to the stock and bond method of valuation, I still consider it as one of the best indices of value obtainable.

Capitalization of net railway operating income is generally recognized as an important element in ascertaining the value of a railroad property. By this method the net railway operating income for an arbitrarily determined period of time, usually five years, is averaged and the amount ascertained is capitalized at a reasonable rate of return. The capitalization method assumes that value can be based on the average profit earning capacity of the railroad and that the amount upon which a fair return has been earned over the test period is the value of the property. Average earnings for a period of five years preceding the assessment date are usually considered. The use of a single year's earnings as the basis from which to determine the value of a railroad property is seldom, if ever, given serious consideration. A shorter period than five years is sometimes advocated and used, but the gener-
189 ally accepted test period is a five year period. The use of a three year period at the present time, when two of the three years, namely, 1931 and 1932, are the worst years in railroad history in the Northwest since the panic of 1893, in my opinion has but little justification. The railroad plant is still in existence and also its capacity to earn. The use of a three year period by the State Board of Equalization in 1933 could only be justified if the Board had positive proof that the average earnings of those three years was a correct index of the future. Manifestly no such proof could be produced. I make that statement because as a general policy the five year period had been the period which had been given the same weight by the board for a good many years.

The capitalization of net railway operating income probably has more serious objections than the stock and bond value. The capitalization method of valuation determines value wholly by past income. It fails to take into account changes that have taken place in the property during the test period. I believe that that would not be a valid objection to it in this case because there has been no particular change in the property. The chief difficulty in the use of this method is to determine a reasonable rate of capitalization. The rate of capitalization cannot well be less than investors are willing to accept in making an investment in the same class of risk under ordinary conditions. When you have a condition such as we have had in the last several years when earnings have collapsed and stock and bond values have collapsed, I do not see any reason for changing the rate of capitalization to conform to the conditions even though many rates have changed. The

securities are in the hands of the public and they have to take their loss. I think it is generally conceded that the rate of return that the company is allowed to earn under State and Federal law is a fair rate to use in the capitalization of net railway operating income. Under the Federal law the
190 railroad rate structure is supposed to permit a return of six per cent on the physical value or cost of the property.

I think that the 6% rate of return is justifiable under present conditions if you take into consideration what has happened to all other property owners. The farmer's income has been wiped out, the business man's income has been wiped out. If you are going to base values entirely upon what property is earning at the present time you would not have any value as to most classes of property.

The assessment of general property in North Dakota has not been reduced in conformity with the drastic and decreased economic return from the property and could not be so reduced without so drastic a reduction in revenues as to endanger the continuance of the functions of government. The State Board of Equalization of North Dakota in my opinion could not grant to the owners of property a drastic reduction in value without gross discrimination against other property owners in much greater economic distress. I think the mere fact that the securities representing a certain class of taxable property are quoted on the market, its earnings are readily available and that consequently changes in the market value of such property may be readily ascertained, does not entitle such property to preferential treatment by a State Board entrusted with the duty of equalizing property values so that taxes shall be equitably distributed according to the market value of all classes of property. Assessing officials and equalizing boards during the last several years have been confronted with a very difficult situation. Values which had been more or less stable for a generation have melted rapidly away. If all assessments had been reduced to conform to actual market value the State and its subdivisions would have ceased to function, as the revenue would not even approximate necessary
191 expenses. Farm property constitutes about 65% of the total taxable value of North Dakota. An economic return from such property as will be shown in exhibits which I have prepared, has decreased about 75% compared with the 1924-1928 average. Interest and taxes and cost of operation undoubtedly have exceeded the gross income by a large margin, leaving nothing for the support of the family or a

return on property. Under such conditions in order to equalize the tax burden in conformity with the value of all classes of property capitalization of five year average net railway operating income at six per cent in my opinion would result in giving preferential treatment to the railroads as compared with other property owners.

There is another very serious objection to the capitalization method and that is where a property is operated at a loss over a period of years there are no earnings to capitalize and no value whatever will be reflected by the use of the method. Such a property undoubtedly would still have a present and a prospective value. Such present and prospective value would be reflected by the use of the stock and bond valuation method. A composite of the stock and bond valuation method and the capitalization method in such case would produce a value of only half the value placed on the property by the investing public.

The criticisms that I have offered of these two methods are not sufficient to render them valueless. On the contrary the two methods are universally approved as the two best evidences of the value of a railroad which are available. There are certain difficulties in connection with either method, neither method is altogether accurate. I think the valuation of any class of property has not yet become an exact science in which there is no room for the exercise of judgment and discretion. Much must be left to the judgment and discretion of the assessing board or official and this is true no matter what the character of the property may be.

192 In the exhibits which I have prepared in this case, I have used the composite method of valuation, giving equal weight to the stock and bond method and the capitalization method of valuation. In order to determine whether the Great Northern railroad in North Dakota has been continuously overassessed as alleged in the complaint of the plaintiff I have prepared exhibits in which the value of the Great Northern Railroad in the state is determined by several different methods for the assessment years 1929, 1930, 1931, 1932 and 1933.

Having ascertained the system value, I proceed to apportion it among the states. The distribution of railroad values among states is probably the most difficult problem in connection with the assessment of railroad property. Its solution is less satisfactory than the problem of ascertaining system value as a whole. Every method of assigning values

to states is vulnerable at some point. There is no uniformity in State practices in making such apportionments, neither is there agreement among railroad tax men as to the proper methods of assigning values to states. Most taxing boards take the position that no single method or factor of apportionment gives assurance of dependable results and that it is safer to use a composite of various factors which more or less accurately measure the relatively market value of the property in the individual states.

In 1923 a committee of the National Tax Association reported to the tax conference, I believe the committee had worked on the problem for a year and that committee recommended the use of five factors of allocation. The factors they recommended were first mileage of all tracks operated, second, physical property, third, car miles, fourth, traffic units, that is ton miles plus passenger miles, and the total operating revenues.

193 The National Tax Association is an organization of state officials and officials of railroad companies and other public utility companies and large corporations, and my recollection is that only state officials and certified public accountants have voting power but the officials of the big businesses throughout the United States belong and attend those meetings.

The committee in its report made the following statement: "There is not a single known accepted basis of allocation that is not weak at some point or another. Any one of them might work out admirably in one state but produce an absurd result in another state. No one method is a safe guide to distribution and hence it is necessary to use a composite basis, employing, however, only those bases that have something to recommend them." The committee considered nine methods of allocation and discussed those nine methods in their report. The methods were track mileage, net earnings, gross earnings, car mileage, train mileage, car and locomotive mileage, traffic units and physical valuation and of these nine methods considered they recommended the five that I previously mentioned and those five, in substance, are approximately what we have used in North Dakota to a greater or less extent for a number of years; the only difference I believe is that we have used car and locomotive mileage and not car mileage. They recommend that five year averages be used as to the business ratios and that the property ratios such as mileage of all tracks and physical property be as of December 31st preceding the assessment.

When I say "we used", I refer to the exhibits prepared by the State Tax Department for the use of the State Board of Equalization.

In the exhibits that I have prepared, I have used the transportation service factor, that is car and locomo-
194 tive mileage, revenue traffic units, gross operating revenues and mileage of all tracks operated and mileage of all tracks owned and operated and leased and operated, excluding trackage operated under traffic rights, also the physical property factor and the net revenue factor. The net revenue factor the committee did not recommend; they recommended that that factor should not be used. I have set up my exhibits using three factors, four factors, five factors and six factors, showing the result of different combinations. I should explain that mileage of all tracks owned and operated and leased and operated, that factor, the way it has been set up, excludes I think approximately one thousand miles of line operated by the Great Northern over property of other companies where the other company owns and maintains the property. I have just set it up as an example. In the factor mileage of all tracks operated I use all tracks operated as reported by the company and that would include all tracks operated under traffic rights.

I have another factor consisting of mileage of all tracks owned and operated, and leased and operated, in which I have excluded trackage operated under traffic rights, but I have not used both factors in the same setup. The use of the transportation service factor assigns to each state such part of the total value of the system as the number of car and locomotive miles run in the state is a part of the whole number of car and locomotive miles run in the system. It is roughly indicative of the relative amount of business done in the state. It reflects the relative use of property in the state, both as to equipment and as to the road itself. This factor ignores the nature of the traffic, the character of the haul, the utilization of car capacity, differences in rates, whether the haul is of high class freight or low, and other equally important transportation factors except the one represented by itself. The use of the revenue traffic unit factor has more to recommend it than the transportation factor. It ascertains how many tons of freight
195 and how many passengers were carried one mile on the system and in the state and from these figures the state ratio is produced. The factor is a composite traffic unit and passenger miles and ton miles.

The gross operating revenues factor assigns values on the basis of relative earnings, is the most commonly accepted factor of allocation, is regarded by some as the best of all possible methods. Intrastate earnings are easily ascertainable and are accurate; interstate earnings are commonly distributed on a mile haul basis. This factor gives weight to the character of the traffic, whether high or low grade, it covers the defects in the revenue traffic units method and in the transportation service method. Until this case came up or it was started I have never heard any serious objection to this method or to the method in vogue on most railroad systems of assigning interstate revenues to the various states. So far as I know the distribution of revenues on the basis of cost of service, which has been advocated in this case, had never been used anywhere.

The all track mileage factor includes not only miles of line but takes into consideration second tracks, third tracks, yard tracks, sidings, terminal trackage and all other tracks. The use of this factor assigns to each state such part of the total value of the system as the total trackage in the state bears to the total trackage of the system. The assumption that underlies the use of this factor is that where traffic is heavier and more business is done the all track mileage is correspondingly great. The all track mileage factor has frequently been given recognition by the courts and has also been frequently condemned where the volume of the traffic carried in the particular state or the ratio of the total traffic carried in the state was out of line with the ratio of all track mileage. The percentage of the Great Northern system
196 assigned to North Dakota by the use of this method is very close to the percentage of the system value assigned to the state by a number of other factors. Its use can possibly be justified in the case of the Great Northern Railway on the assumption that the Great Northern mileage in North Dakota furnishes a large amount of long haul business to the system and that this fact should be given recognition. Much has been said in this case about the large percentage of branch line mileage on the Great Northern system in North Dakota. 61% of the Great Northern mileage in North Dakota is branch line mileage but an important element of branch lines is that they furnish long haul business to the system. Without its branches a main line could not exist. In dividing interline revenues connecting carriers commonly allow branch lines far more than the mileage prorate of the total revenues in recognition of the peculiar value of branch lines.

The mileage of all tracks operated in the case of the Great Northern Railway Company includes approximately 1031 miles of tracks that are neither owned or leased by the Great Northern Railway Company. The trackage is owned and maintained by other companies but the Great Northern has the right to operate some or all of its trains over such trackage. The inclusion of this traffic in the allocation of values by the owning company as well as by the companies having the right to operate over the trackage naturally assigns to the state or states where the trackage is located a value which may not be justified. In certain exhibits which I have prepared I have used this factor in conjunction with other factors.

The physical valuation factor assigns to each state such share of the system value as the reproduction cost of property in the state bears to the total cost of reproduction of the system. The Interstate Commerce Commission cost of reproduction figures are used as one of the several factors in the allocation of values in the exhibits which I have prepared. The chief objection to the factor is that the business in the state may have little relation to the investment in the state. The factor would penalize a prairie state where the investment per mile is small as compared to a mountainous state and where the expense of operation is low as compared to the mountain states. It is the generally accepted theory that cost of property does not reflect value and assuming that this is true that cost of property does not reflect value and if it does not reflect the volume of business done in the state and does not reflect the relative profitableness of that business it would seem that the factor was not entitled to much weight. It does, however, reflect the relative cost of property in the several states.

197

The net earnings or net revenue factor is held by many people to be the most defensive basis of distribution of railroad values if it were accurately ascertainable. Unfortunately, it is not accurately ascertainable and it is given little weight for that reason. It is, however, in use I believe in Wisconsin and several other states and given some consideration. I might say in connection with this earnings or net revenue factor that the National Tax Association rather severely condemned it and I will read that portion of their report. This is a portion of the report made by the committee of the National Tax Association in 1923 on the apportionment of public utility property to states. The report said as to net earnings "Strange as it may seem, net earnings is perhaps the worst of all measures of apportionment. If net

earnings figures were accurate there would be no need of a method of allocation, but the fact is that figures showing net earnings by states are so inexact as to be meaningless.

198 System net earnings are accurate and exact because they represent what is left after deducting the total system operating expenses from the total system gross earnings, but when an attempt is made to ascertain what part of the net was made in each state the task is hopeless. Many state commissions call for a report of net earnings by states and in attempted compliance with the demand railroad accountants have worked out certain formula for producing the figure, but a great part of the system expenses are insusceptible of localization and the result is that operating expenses allocated to a state do not even approximate the true figure. One state is given much less than her fair share of the total expense, another is given vastly more than her proper amount. This is now so obvious and so well recognized that few states pay any attention to net figures by states either for valuation purposes or fixing a ratio for apportionment. In any case, the use of the so-called net earnings measure as a means for determining the apportionment of net earnings is merely chasing ourselves in a circle."

In my exhibits I have used all track mileage as of the close of the year preceding the assessment. Physical property was taken as of the close of the year preceding the assessment. This date was taken as to both of these factors in order that they might reflect changes that had taken place in the property right up to the assessment date as near as might be. The business factors were taken for a five year period. I might say in connection with the business ratios which I have used that averages are generally taken for a five year period in order to avoid the violent fluctuations which might occur if valuations were placed on data for a single year.

199 I have prepared Exhibit A which gives a statement showing the par value of the capital stock and funded debt of the Great Northern Railway Company in the hands of the public as of December 31, 1932, also average market quotations and market value for one year and for the five year period ended December 31, 1932. In this exhibit the Great Northern Railway Company general mortgage gold bonds have been sent out separately. I will read the footnote "Great Northern Series 'A' gold bonds were issued to refinance the Great Northern's proportion of the Burlington-Northern Pacific-Great Northern collateral trust bonds. By reason of the issue of these bonds ownership of 48.59%

of the stock of the Chicago, Burlington & Quincy Railway Company was vested in the Great Northern Railway Company. The bonds are primarily a lien on this stock, were issued to purchase the stock and are secured by a pledge of the stock. The amount originally issued was $115,000,000. On December 31, 1927, $9,141,000.00 principal amount of general mortgage Series 'A' 7% bonds were retired, leaving outstanding $105,859,000.00." I mention this issue in particular because it is commonly supposed to represent the largest single item of non-operating property owned by the Great Northern, and in a determination of the value of operating property it is necessary to assign a value to the Burlington stock along with other non-operating property. This Exhibit A is a table from which I will develop figures in the exhibits subsequently introduced.

(The document marked "Defendant's Exhibit A" was offered and received in evidence and is included herewith as Defendant's Exhibit A).

In the statement in the foot-note that the 7% bonds are primarily a lien on the Burlington stock, the word primarily probably does not mean anything with reference to the present situation because the 7% bonds are a lien on part of the property of the railway as well as the Burlington
200 stock. I have not been able to find out whether all Great Northern General Mortgage bonds are just as much a lien on the Burlington stock as the 7% bonds are.

I have also prepared Exhibit B which shows the average market value of stocks and bonds for the years 1924 to 1932, also for the five year period ending December 31, 1926, 1927, 1928, 1929, 1930, 1931 and 1932. I have shown both the single year valuations and the five year valuations for a period of years. The data in this table discloses rather violent changes in the single year valuations, particularly in the year 1931 and 1932. There is a decrease of 19% in stock and bond values in 1931 and 35.84% in 1932. The five year valuations show very much less fluctuation from year to year. The table is presented because it furnishes some of the basic data I used in other exhibits and to illustrate the impracticability in using a single year period in making use of stock and bond values on account of the changes in stock and bond values from year to year.

My one year period fluctuations disclose a fluctuation all the way from an increase of 10.94% in one year to a decrease of 35.84% in another year, but the five year averages disclose a fluctuation only between an increase of 4.57% in one

year and a decrease of 10.82% in another year. The drop from 1930 to 1931 in the total stock and bond value is from $571,000,000 to $461,000,000. The next year the drop was from $461,000,000 to $296,000,000.

I have prepared Exhibit C which is a statement of the average price of the capital stock, the dividends paid on the stock and the amount earned per share for the years 1916 to 1932, inclusive. The exhibit also gives a statement of corporate surplus at the end of each year. The record shows that in 1916 the stock of the Great Northern sold at $121.00
a share; it dropped somewhat over a period of years
201 down to a low of $61.50 in 1924. A rise in value then
took place over a period of some years to a high of $108.10 in 1929; 1930 the stock was $82.10; 1931, $45.20 and in 1932 the average quotations were $13.20. Over the seventeen year period covered in this exhibit the stock earned $131.00 a share and paid slightly over $92.00 in dividends. The total dividends declared were $229,876,051.00.

I used the 17-year period because a 6% return over a seventeen year period amounts to approximately $100.00 and in that period 6% stock would pay in dividends slightly more than the par value. I have just used it for an illustration. The earnings per share of stock in this 17-year period was $131.39. The corporate surplus increased from $106,000,000 in 1916 to $165,000,000 in 1929 and has now dropped or had dropped at the end of 1932 to $149,000,000. The book equity of the stockholders in the profit at the end of 1932 is represented by the par value of the capital stock plus the corporate surplus or $397,979,053. The market value of the stock for 1932 was $32,830,915 or 8.25% of the book equity. The exhibit presents a rather conprehensive picture of the record of the Great Northern stock over this seventeen year period and shows the stockholders' equity in the property in the way of surplus at the end of each year.

(The documents marked "Defendant's Exhibit B" and "Defendant's Exhibit C" were offered and received in evidence and are included herewith as Defendant's Exhibit B and Defendant's Exhibit C).

Referring to the state's showing in this exhibit of dividends in 1930 at the rate of $7.50 per share and amounting to $18,000,000, the report to the State Railroad Commission discloses that of this $18,000,000, $6,000,000 were declared the year before but the report to the Tax Department did not disclose that. I have no information that out of the $2.50 de-

clared in 1932, only $1.50 was paid that year and $1.00 of it was paid in 1933.

202 I prepared Defendant's Exhibit D from the annual reports of the Great Northern Railway Company to the State Tax Commission of North Dakota in part and in part from special reports. In this exhibit I have shown the total operating income, operating expenses, net operating revenue, taxes, uncollectible revenues, railway operating income, hire of equipment and joint facility rents, and the final figures show the net railway operating income. The lower half of the table shows non-operating income, gross income, interest deduction and other deductions on funded debt and the net income. The average net railway operating income during the nine year period ending December 31, 1930, was $26,514,792 per annum. This compares with the net operating income of $12,669,420 in 1931 and $1,290,551 in 1932. The table presents or the exhibit gives certain basic figures which are used in other exhibits.

(The document marked "Defendant's Exhibit D" was offered and received in evidence and is included herewith as Defendant's Exhibit D.)

I prepared Defendant's Exhibit E from the annual reports of the Great Northern Railway Company to the State Tax Commissioner and special reports and made the computations myself. The exhibit discloses average net railway operating income for various five year periods, five year period preceding the 1929 assessment and the assessment of the next four years. The average net railway operating income for each five year period is capitalized in the next succeeding column at 6% for each of the five year periods shown and in the last column capitalization of net railway operating income is shown at the rate of five per cent. The lower half of the table shows the amount earned on the total stock and bond value by the railroad and it also includes non-operating earnings. The gross income as shown is the sum of the net railway operating income and non-operating income
203 from the years 1928 to 1932. It shows, for 1932 that the stock and bond value is $296,000,000, gross income $6,386,643 and that on an average the securities sold on a basis of 2.16% return, that is, the company earned 2.16% on the total stock and bond value for the year 1932.

(The document marked "Defendant's Exhibit E" was offered and received in evidence and is included herewith as Defendant's Exhibit E).

I do not mean to say that with a $296,000,000 market value the securities were selling on a yield to the investors of 2.16%, but that the properties of the Great Northern earned 2.16% on the stock and bond value. The yield to the investors was much higher. The gross income is the gross income of the corporation and not of the securities.

I prepared Defendant's Exhibit F. The source of my information was the annual reports of the company to its stockholders as to the information shown in the first schedule on the table. On the second schedule I have shown the information reported in the annual reports of the company to the Tax Commissioner of North Dakota. This table gives a comparative statement of the company's investment in operating and non-operating property. At the end of the years 1926 to 1932, inclusive, non-operating property is listed under the head of stocks, bonds, other securities and other miscellaneous property. The second schedule in the exhibit contains a somewhat different statement relative to investment in operating and non-operating property. Investment in the road and equipment as shown in Schedule one is not correct as it does not include certain wholly owned subsidiary companies operated as a part of the Great Northern system. In schedule two those wholly owned subsidiary companies have been included under the head of road equipment and non-operating capital assets have been decreased accordingly and I also have included under non-operating capital assets in schedule 2 locally assessed real estate that is
204 really carried on the books of the company as operating property. The purpose of the exhibit is to secure the ratio between operating and non-operating assets according to the cost of those assets as they appear on the books of the company and this percentage figure finally arrived at is used as one of two methods in assigning stock and bond values to operating and to non-operating property. The property ratio is given 50% weight and the relative earnings from operating and non-operating property over a period of years is given 50% weight. The two percentages are averaged and a composite percentage is used in assigning to non-operating property its relative proportion of the stock and bond value as reflected by the property ratio and the income or earnings ratio. The exhibit is not intended really to prove anything except to arrive at the relative investment of the company in operating and non-operating property. The ratio shows the relation between non-operating assets and total capital assets and 21.26% is the ratio of non-operating assets to total capital assets.

(The document marked "Defendant's Exhibit F" was offered and received in evidence and is included herewith as Defendant's Exhibit F).

I prepared Exhibit G. The sources of the exhibit were the annual reports of the Great Northern Railway Company to its stockholders. The exhibit presents a somewhat detailed statement of non-operating income received by the Great Northern in the years 1923 to 1932, inclusive. It is intended as an analysis of the sources of non-operating income. It shows that 77.48% of non-operating income was dividend income. Most of the dividend income was from ownership of Burlington stock. In the five-year period ending December 31, 1932, 89% of all dividend income was received from dividend stock and 69% of all non-operating income was received from Burlington stock. It is thus apparent that the task of valuing the non-operat-
205 ing property of the Great Northern is to a large extent concerned with the value of this Burlington stock. Over 97% of this stock is owned by the Great Northern and Northern Pacific Railway companies and the balance is seldom, if ever, quoted on the market. That is for five years.

The Great Northern Railway Company in its presentation in this case has claimed a large value for non-operating property and particularly for Burlington stock. I want to call attention to the fact that the earnings on the stock fell from $29,576,538 in 1929 to $1,502,815 in 1932, or a percentage decrease in earnings amounting to 95%. The exhibit was really intended to bring out to some extent the fact that non-operating income has fallen off along with operating income and I wanted to point out in connection with the exhibit that the bond interest paid on these so-called Burlington bonds in both 1932 and 1933 is $4,919,593 short of the amount paid out on the bonds issued to purchase the stock, and that this valuable asset has turned into a liability in view of the fact that the interest requirements on the bonds are now far in excess of the dividends received on the stock and that this situation has undoubtedly seriously affected the market price of the stock of the Great Northern itself.

(The document marked "Defendant's Exhibit G" was offered and received in evidence and is included herewith as Defendant's Exhibit G).

I have prepared Exhibit H from the annual reports of the Great Northern Railway Company to the North Dakota Tax Commission. This exhibit gives a condensed comparison of operating and non-operating income and total income for the

years 1922 to 1932. The lower half of the table shows average net railway operating income for a seven year period ending December 31, 1928, and it is shown for a similar seven year period ending December 31, 1929, 1930, 1931 and 1932, and the average non-operating income is shown for the
206 same period and the total and the ratio of non-operating income to the total. The percentages as shown in this table are used in apportioning stock and bond values to non-operating property in conjunction with the property ratios shown in a previous exhibit. A seven year period was used rather than a five-year period in securing relative income ratios because an abnormally large income was received in certain recent years from non-operating property at a time when actual earnings of such property were abnormally low. This was true of the Northern Pacific, if I may bring that in, to a much greater extent than it was in the case of the Great Northern, and in preparing exhibits for that case a seven-year period seemed to be the only way to iron out the very greatly fluctuating income from non-operating properties, especially dividends. The operation seemed to be that of milking all subsidiary companies during these last few years and to some extent this was true as to the Great Northern. The seven-year period I might say was used solely for the purpose of securing a percentage relationship between total income and income derived from non-operating property. In the case of the Great Northern there is but little difference between the use of the five and the seven-year period.

I computed the approximate difference that there would be on the five-year basis. It makes a difference of about $1,000,000 in the stock and bond value assigned to North Dakota and that would be about half a million dollars in the composite value assigned to North Dakota.

(The document marked "Defendant's Exhibit H" was offered and received in evidence and is included herewith as Defendant's Exhibit H).

207 I have prepared Exhibit I from the annual reports of the Great Northern Railway Company to the North Dakota Tax Commission. I made the computations myself. This table makes the actual apportionment in conformity with the percentages derived in several previous exhibits. I might say in explanation that all of these exhibits have covered a period of years and that I have tried to develop the

figures necessary to test the validity of the North Dakota assessment of the Great Northern Railway Company for the last five years, that is, for 1929, 1930, 1931, 1932 and 1933, and that is the reason for having so many five year periods shown on these exhibits. In this exhibit the market value of stocks and bonds for the five year period preceding the assessments of 1929 to 1933 is shown. The ratio of non-operating income to total income for the seven year period, the ratio of non-operating assets to total capital assets as of December 31st preceding each assessment year and the composite ratio. An assignment or an apportionment of stock and bond values to non-operating property is then shown and in the final column the stock and bond value is assigned to operating property. This table discloses that by the use of this composite ratio of these two other ratios which I developed in my previous exhibits, the stock and bond value to be assigned to non-operating property in 1933 would be $155,685,389, which compares with the figure given by Mr. Schoettler in Plaintiff's Exhibit 8 of $182,235,816. The two methods of valuation are entirely different. I have attempted to assign to non-operating property its relative share of stock and bond value as measured by relative investment and relative earnings over a period of years. Mr. Schoettler has made a direct valuation by
208 several different methods of that same property. He has used the capitalization method as to some items of property and has used the assessed valuation as to other items of property. So far as I know there are no standard methods of determining value of non-operating property which are in general use. Each state seems to have its own method. The method that I have used was used by the State Tax Commissioner of North Dakota for several years when I was with the Department, but I do not recall the period. My method more closely approximates the true figure than any method of which I know.

As to the system used by Mr. Schoettler, the problem of determining the extent to which stock and bond values are reflected by the value of any particular class of property such as this non-operating property is difficult. In the several years of depression or during the certain period of this recent depression the common stock of quite a number of industrial companies was selling on the market for less than the cash assets in the treasury of the company available over and above all obligations and without taking into consideration the value of any tangible assets of the company. In other words, the cash in the treasury was more than the total market value of the stock, so it is rather difficult to say to what extent non-operating assets are reflected in stock and

bond values. Mr. Schoettler has used the method of direct valaution. There are two or three items there that I would criticize, the first one is the valuation assigned to the Chicago, Burlington & Quincy Railroad Company by capitalization method using a rate of six per cent. The statement of Mr. Schoettler I believe justified that rate because of the fact
that the rate of six per cent is used in valuing the op-
209 erating property of the Great Northern Railway Company by the North Dakota Tax Commission or had been so used. In my opinion, however, the problem is entirely different. A man buying a property, an entire property, would probably be satisfied with a return of six per cent on his investment. If he bought all the bonds of that property he probably would be satisfied with a return of four and a half or five per cent, but if he bought all the stock of the property, where he is taking a greater speculative risk he would demand a larger return and in my opinion seven per cent would be a more correct rate to use in the capitalization of common stock dividends to ascertain value. The item number 5 on Exhibit 8 shows the par value and book value of the Dakota and Great Northern Townsite Company. The par value is $50,000, book value $25,000 and the assessed valuation of the property owned by the company, amounting to $1,723,892 is listed as a proper deduction. It is rather difficult to say to what extent idle land, not producing any income, would be reflected in stock and bond values. While it would seem that the assessed valuation was excessive in comparison with the investment, the real problem is not what is that property worth, it is to what extent is that property reflected in the stock and bond value of the Great Northern sytsem; and to what extent idle and unproductive property can be reflected in stock and bond value is a rather difficult problem to determine. The same criticism would apply to the Somers Lumber Company possibly, I don't know anything about that property, I will pass that up. Item 10 shows the investment of the Great Northern in Spokane, Portland &
Seattle Railway Company stock and bonds. The Great
210 Northern owns half the stock and half the bonds. The assessed valuation of the underlying properties back of the stock and bonds is listed as a proper item of deduction as to the Great Northern one-half interest. Well, now that property has been a very unproductive property as far as being an investment is concerned. It has paid its bond interest very irregularly for a long period of years and I believe never has paid a dividend on the stock and I think if the income from that property for the last five years were capitalized the Great Northern share of that income valuation listed would be around between five and six million dollars using the six

per cent rate of capitalization, in comparison with the $20,000,000 set up on Mr. Schoettler's statement. There were really three different methods used by Mr. Schoettler. The assessed valuation of the property was set up as the value as to part of the property listed and the earnings were capitalized at 6% as to certain properties. It seems to me that a uniform method should have been followed. The third method was an estimated value of one or two items.

On Exhibit I, I have made an apportionment of the stock and bond value to the operating and non-operating property by a composite method giving 50% weight to relative income and 50% weight to relative investment or cost as shown on the books of the company. I have used that consistently as to all of the non-operating property of the railroad which has all been treated as one individual item and valued on that composite basis.

The first column in this exhibit shows the assessment year and the second column shows the average market value of stocks and bonds for the five year period preceding the assessment year. The third column shows the ratio of
211 non-operating to total income for the seven year period. I used a seven year period because of the fact that there were extraordinary dividends received during the last few years and there were non-recurring items of income. There was a special dividend received from the Burlington in 1930 of something in excess of four million dollars, I believe, I have not got the figures, and during the last three years preceding the 1933 assessment a railroad company drained its subsidiary companies of cash resources as to all of the subsidiary companies where those resources were available, and those non-recurring items of income do not reflect the relative earning ability of the two classes of property. This method was adopted largely on account of the Northern Pacific situation, but the same facts that apply in the Northern Pacific case would also apply in part to the Great Northern. There is a large amount of non-recurring income which did not reflect relative earning ability of the two classes of property. So that in the case of the Great Northern, instead of eliminating those non-recurring dividends, I attempted to spread them out over a long period of years. If I had used the five year period, it would make $1,140,000 difference in the stock and bond value assigned to North Dakota and about $571,000 difference as to the composite value.

The fourth column on Exhibit I shows the ratio of non-operating assets to total capital assets as of December 31st preceding each assessment year shown on the Exhibit and

that is according to the relative investment in non-operating assets compared with total operating assets. My fifth column gives the composite ratio of the two percentages shown in the third and fourth columns. The sixth column shows the stock and bond value assigned to non-operating property by the composite ratio found in column five and the seventh column shows the stock and bond value assigned to operating property, found by deducting the stock and bond value as-
212 signed to non-operating property from the total stock and bond value. The purpose of this table in connection with one or two of the previous tables which I have introduced is to arrive at the value of non-operating property the same as Mr. Schoettler has attempted to do in Exhibit 8. By his method the total value of non-operating property in 1933 was one hundred and eighty-two million dollars in round figures and by my method it is one hundred and fifty-five million dollars.

(The document marked "Defendant's Exhibit I" was offered and received in evidence and is included herewith as Defendant's Exhibit I).

I prepared Exhibit J. The sources were the annual reports of the Great Northern Railway Company to the Tax Commissioner and the I. C. C. Statistics of Railways. In explanation of that I might say that the railway reports made to the State Railway Commission and to the State Tax Department for years prior to 1930 were all burned when the State Capitol burned in 1930. The table or the exhibit is presented to show the allocation of system value to North Dakota on the basis of the all track mileage is a reasonably equitable basis of allocation. The exhibit shows that it is a reasonably equitable basis of allocation by comparing traffic density per mile of track on the system and in the State of North Dakota. I will not enumerate the figures but will call attention to the fact that two years of the five year period preceding the 1933 assessment the traffic density per mile of track in North Dakota was higher than the system average. The ratio in 1928 was 101.23 and in 1933 was 105.46. In the other three years the traffic density per mile of track in North Dakota was lower than the system average. For the five year period 1928 to 1932 the traffic density per mile of track in North Dakota was 5.77 lower than the system as a whole. The table
213 discloses that the lowest ratio appeared in 1926 when North Dakota's ratio was 86.33% based on a traffic density comparison.

(The document marked "Defendant's Exhibit J" was offered and received in evidence and is included herewith as Defendant's Exhibit J).

I prepared Exhibit K and made the computations therein from the annual reports of the Great Northern Railway Company to the State Tax Commissioner and to the State Board of Railroad Commissioners of North Dakota and also from annual reports of the company to its stockholders. The exhibit gives a comparison of the results of operation for an average mile of track of the entire system and for an average mile of track in the State of North Dakota for the years 1926 to 1932 and also for the three five-year periods ending December 31, 1930, December 31, 1931, and December 31, 1932. The results of operation are compared on the basis of the average operating revenue per mile of track, the average ton and passenger mileage per mile of track and average car and locomotive mileage per mile of track. The ratio of North Dakota averages to system averages are shown for each period covered and for each index of business performed an average of the three indices is given. The composite ratio shows the relative worth of an average mile of track in North Dakota to an average mile of track of the entire system according to factors which are given general recognition. In two years of the last five-year period the composite ratio for North Dakota was higher than the system averages and was lower in three years of the period. For the five-year period ended December 31, 1932, the ratio of North Dakota averages to system averages per mile of track as to the three indices were 95.90%. The general conclusion which may be drawn from the table is that an average mile of track in North Dakota is only slightly less valuable than an average mile of track for the en-

214 tire system.

(The document marked "Defendant's Exhibit K" was offered and received in evidence and is included herewith as Defendant's Exhibit K).

I prepared the table marked Exhibit L from the reports of the railway company to the State Railroad Commission and Tax Commissioner of North Dakota. The table gives a comparison of net operating revenues for the Great Northern system and for the road in North Dakota for an eight-year period. Under system figures is shown operating revenues, operating expenses, the operating ratio and net revenues. The operating ratio is the ratio of operating expenses to total operating revenues. The final column shows net revenues. For the entire eight-year period as to system figures the exhibit shows that the operating ratio was 67.71%. For

North Dakota the average operating ratio for the eight-year period was 62.44%. I have also shown on this exhibit averages per mile of track operated as to each item. The gross revenues per mile of track operated are higher for the system than for the State of North Dakota, but net revenues per mile of track for the system average $2,816 during the eight-year period and for North Dakota average $3,013 per mile of track during the eight-year period. The factor or rather the net operating revenues has been used as one of the factors of apportionment in some of the exhibits which I have prepared and it would seem that the relative profitableness of the business in a given state was one of the things that might well be taken into consideration by the assessing board, and that is the purpose of this table to show that per mile of track operated the Great Northern system in North Dakota is more valuable than system figures.

215 (The document marked "Defendant's Exhibit L" was offered and received in evidence and is included herewith as Defendant's Exhibit L).

I prepared Exhibit M. As to North Dakota the figures were taken from the reports of the Great Northern to the State Railroad Commission. As to all other states the information was certified to me by some official of the State Railroad Commission or Public Utility Commission in that state and was taken from the annual reports of the company to that state, not exactly, however, in the form shown in this table. The information shown in this table was derived from such certified reports. I did not have the original records available in the preparation of the table.

The fact that the traffic originating per mile of road in North Dakota is less than the traffic originating per mile of road over the balance of the system could probably be drawn from comparisons or from information contained in the annual report of the company to the State Railroad Commission, for the state as compared with the system. This method of assigning valuation to the states upon the basis of the origination of traffic has never been used by tax men as far as I know, and it has never been advocated by any railroad appearing before the State Board of Equalization of North Dakota. But the plaintiff's exhibit gives a comparison of individual states and, of course, that information was not available.

An attempt to allocate value upon the basis of originating traffic assigns import traffic to the state in which the port of entry is located and thus in my opinion upsets the validity of

any comparisons based upon traffic origin. The originating traffic figures do not include any revenue received from
216 connecting lines in any state, merely the traffic originated on the particular road, and certainly the state of Washington should not be credited with originating traffic, which is import traffic and which is actually received from a connecting water carrier. A shipment from New York to Seattle, carried over the Great Northern from St. Paul to Seattle would not be classed as traffic originating on the Great Northern, but under the rules laid down in the I. C. C. report, a shipment from China to St. Paul, carried over the Great Northern from Seattle to St. Paul, would be classed as originating traffic and credited to the State of Washington.

This kind of a comparison fails to give any consideration to whether the haul is high class freight or low class freight or to the length of the haul, consequently it fails to show the relative profitableness of the business originating in any state. Now the Great Northern Railway Company affords an exceptionally good illustration of why an allocation should not be made on such a basis. In the five-year period, 1924 to 1928, 15.7% of the total carload tonnage hauled on the Great Northern system was ore and concentrates and this business accounted for only 13.2% of the total revenue from carload traffic. In 1929 50.7% of the total carload tonnage hauled was ore and concentrates and this tonnage accounted for only 15.4% of the total carload revenue. In the three-year period 1930 to 1932, inclusive, 34.05% of the total tonnage hauled, including less than carload traffic in this case on the Great Northern system was ore and concentrates and this accounted for only 8.08% of all freight revenue. The figures indicate that the actual tonnage originated in any state has but little significance. Taking the figures for the last three years the percentage of total tonnage from ore and concentrates to the total originating traffic was 34.05%, while revenue re-
217 ceived from the traffic amounted to only 8.08% of all freight revenue, consequently giving special significance to the tonnage of the originating traffic without any consideration to how far it is hauled or what the freight charges were or what the revenue amounted to would be absurd.

My table 15, Exhibit M discloses the average tons originated per annum in each state and the average number of tons originated per mile of track in each state and the percentage of the system total value which each state originated during a five-year period ending in 1932. The figures for Minnesota show that Minnesota originated an enormous volume of tonnage, 54.13% of all revenue freight originated on the Great

Northern system during the five-year period ending in 1932 originated in the State of Minnesota and consequently the averages per mile of track in Minnesota are far in excess of what they are in any other state. The figures for Washington show that Washington was much less than the system average. The system average per mile of track amounted to 2,073 tons, while Washington amounted to only 1,712. The originating traffic per mile of track in North Dakota during the five-year period per annum was 854, in South Dakota 536, in Montana 781, Idaho 891, Oregon 815, Wisconsin 718. While in my opinion the volume of traffic, freight traffic originating in any state has but little connection with the value of the railroad in that state, in some states there is a very large amount of connecting road traffic, traffic from connecting roads, and if little or no revenue or little or no tonnage was originated in a state it would not mean that the road in that state has no value as a part of the system.

If the two states of Washington, which originates a large amount of import traffic, and Minnesota, which originates a large amount of low class ore traffic were eliminated from this table, my figures disclose that North Dakota would stand the highest with reference to the remaining states of the system, except Idaho where the trackage is very small.

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(The document marked "Defendant's Exhibit M" was offered and received in evidence and is included herewith as Defendant's Exhibit M).

I made the table marked Exhibit N and made the computations therein. The figures contained in the exhibit were derived from the annual reports of the Great Northern Railway Company to the State Tax Commissioner and from special reports. This exhibit merely gives a comparison of the various apportionment or allocation factors that are used in the exhibits where values are apportioned to North Dakota. Three of the factors of allocation shown on this exhibit reflect the relative business performed in North Dakota as compared with totals for the system. These factors are usually termed or somewhat termed use factors, they are transportation service, traffic units and operating revenues. The next three factors reflect the relative units of property in the state compared with system totals. These factors are trackage operated at the end of the year; the next one is trackage owned and operated and trackage leased and operated at the end of each year preceding the assessment years, and the last item physical property, relative physical property. One of the

factors reflects the relative profitableness of the railroad company's business in the state as compared with the rest of the system. That factor is called net operating revenues.

All of the factors except the trackage factor and the physical property factor are based on five-year averages preceding the assessment year. The trackage factors and the physical property factor are based upon figures as of De-
219 cember 31st preceding the assessment year. The lower part of the table gives various averages applicable to each of the five assessment years, the first set of averages being the average of use factors. Below that is shown the average of trackage operated and the three use factors. The third line shows trackage owned and operated and leased and operated and the three use factors, the four figures being averaged. The fifth line shows the trackage operated, physical property and use factors, the averages shown being an average of five factors, and in the last line there is shown an average of six factors, the trackage operated, physical property, transportation service, traffic units, gross revenues and net revenues. Referring to the percentages applicable to the assessment year 1933 we find that the transportation service factor was 20.04%. That means that North Dakota had 20.04% of the revenue car and locomotive mileage of the entire system during the five preceding years. The traffic units factor is 18.93, which means that North Dakota had 18.93% of the total ton miles, plus passenger miles, on the entire system during the five preceding years. The total operating revenue factor is 18.45%; trackage operated at the end of the year 19.96; trackage owned and operated and trackage leased and operated 21.83; net operating revenues 20.88, physical property 14.32, the physical property ratio being by far the lowest of all the ratios.

All of the factors that I have used in this exhibit are factors in common use by taxing authorities and railroads in connection with assigning values for tax purposes, except the factor which I have termed trackage owned and operated and trackage leased and operated. The Great Northern Railway Company runs its trains over approximately 1033 miles of track which it does not own and does not lease and there was considerable question in my mind whether
220 a trackage factor which included trackage owned by another company and maintained by another company and over which that other company ran its trains was proper to include. I have shown it both ways, all trackage operated and trackage operated, excluding such trackage. I have shown these separately. I have shown all trackage operated

and I have also shown the trackage owned and operated and leased and operated. That is not included in the list where I have six factors. I have used the trackage operated excluding the 1033 miles operated under trackage rights. The only one of the five composite averages which I have made at the bottom, which includes this unusual factor of trackage owned and operated and trackage leased and operated, is the third. By including that factor which excludes tracks neither owned nor leased, I secure a little higher ratio for North Dakota.

I believe that taxing officials and railroad tax men always make composite allocations based upon an average of the results of several of these factors. No single method of allocation is perfect; all methods have their weaknesses and on that account why values are seldom apportioned on the basis of less than three or four or five factors.

I did not include the relative cost of service as a method of apportionment of the system value among the states because I never heard of it. It is not a factor that has ever been used so far as I know; it has never been advocated by railroad companies. On the contrary, the representatives of railroad companies that have appeared before the State Board of Equalization in North Dakota for a long period of years have maintained that operating expenses by states could not be accurately determined and that consequently the net revenue factor should not be used.

I was in the Tax Commissioner's office as Deputy Tax Commissioner until January, 1933. No such factor was
221 ever presented to the State Board of Equalization or Tax Commissioner by any railroad during my period of service. I have read the briefs and tables submitted by the Great Northern Railway Company to the Tax Commissioner for use in arriving at the assessment for the year 1933 and no such factor or contention was included therein.

(The document marked "Defendant's Exhibit N" was offered and received in evidence and is included herewith as Defendant's Exhibit N).

I prepared the table marked Defendant's Exhibit O from the records of the State Board of Equalization. The table shows the assessed value of the Great Northern Railway Company in North Dakota for the years 1915 to 1933, inclusive. The table has some special significance as it shows the value found by the United States District Court for the years 1917 and 1918 and a record of assessments after such adjudication. The United States District Court in the 1917

tax case found that the basis of assessment of non-railway property was 25% of full value and the court adjusted railway assessments for 1917 to such basis. Prior to 1919 assessments in North Dakota were not made on a full value basis. For some years prior to 1917 it was estimated that assessments were approximately 25% of full value. Under the classification law of 1918 the property was divided into three classes, land, town and city lots, bank stock, railroad property and some other classes of property were required to be assessed at 30% of full value. In equalizing assessments for the year 1918, the property in class one when changing from a 25% tax basis to a 30% tax basis, the State Board of Equalization increased the value of property in class one by ten per cent. Class I was land, town and city lots, bank stock, railroad property and some other classes of property. The United States District Court took judicial notice of this fact and in adjusting railroad values in
222 1918 railroad assessments were increased ten per cent over the value found by the Court for the year 1917. This actually resulted in all property in class one being assessed at 27½% of full value. On a full value basis the Great Northern valuation for tax purposes in 1918 was $98,494,772, the same as it was in 1917, but that statement is based upon the fact that it is assessed at 27½% of full value and not 30%. Since 1919 the law has required the assessment of railway property at full value and since 1923 the statutes have required the assessment of all taxable property at full value.

The assessments which I have shown for the first two years 1915 and 1916 were estimated at 25% of full value and for 1917 and that is in accordance with the finding of the court, so that in order to arrive at the 100% full value, I have multiplied those figures by four and produced the full valued basis in the fifth column. For 1918 I have increased the 30% assessment fixed by the court to a full valued basis by multiplying it 3-1/3 times. The remaining figures are the actual assessments. During the period since 1918 the Great Northern had several very substantial reductions in valuation. There was a four per cent reduction in 1919 compared with the full value basis of 1918. This reduction amounted to $3,683,000. In 1921 there was a five per cent reduction in the valuation, which reduction amounted to $4,332,252. There was practically no change in the assessment from 1921 to 1929, when there was an increase of one and one-fourth per cent, amounting to $1,028,291. The assessment stood at approximately the same figure in 1930. In 1931 there was a reduction of $294,691. In 1932, there was a reduction in the

assessed valuation of $4,149,973, a percentage reduction of five per cent. The assessment in 1933 was slightly less than in 1932. Comparing the assessment years 1917 to
223 1933 and using the full value figure for the 1917 assessment, we find that there was a reduction of $19,661,884, a percentage reduction of 19.96%. Comparing 1919 and 1933, there was a reduction of $7,770,442, or a percentage reduction of 8.97%.

(The document marked "Defendant's Exhibit O" was offered and received in evidence and is included herewith as Defendant's Exhibit O).

Exhibit P shows the system value of the Great Northern as reflected by the stock and bonds, market value of stocks and bonds for a five year period preceding each assessment year, system value as reflected by net railway operating income for a five year period preceding each assessment year capitalized at the rate of 6%; also system value as reflected by an average of these two methods. The table shows an apportionment of stock and bond value, value derived by capitalization and an apportionment of the composite value to the State of North Dakota by five different methods.

The figures in my first three columns in Exhibit P are all derived from previous exhibits, and having arrived at the system value for each of these periods, I proceed to apportion the system value according to the factors which I have discussed in previous exhibits. Schedule number 1 shows an apportionment of system values to North Dakota on the basis of transportation service, traffic units and gross operating revenues averaged. The average of the three percentages is found and the apportionment is made on the basis of a composite percentage. This schedule uses just the three use factors, and the schedule shows values applicable to the assessment years 1929, 1930, 1931, 1932 and 1933. The five years were covered in order to show whether or not the assessment of the State Board of Equalization was an accurate and equitable assessment in the years preceding 1933.

Following the percentage figure is shown stock and
224 bond value apportioned to North Dakota, the capitalized value apportioned to North Dakota and the composite value apportioned to North Dakota. I am commencing on column 6 now. The actual assessment for each of the five years is then shown. In the last three columns there is shown the ratio of the assessment to the values assigned by each of these three methods. First, the percentage of the assessment to stock and bond value, the percentage of the assessment to capitalized value and the percentage of the as-

sessment to composite value. The valuation found by this method for 1929, or the composite value found by this method for 1929, shows that the Great Northern was assessed 101.06% of full value; the next three years show an under assessment compared with the composite value assigned. In 1930 there was an under assessment of 3.89%; in 1931 there was an under assessment of 3.41% and in 1932 there was an under assessment of a very small percentage. I was reversing that. The figures on the table show the percentage of the assessment to the assigned value. I was quoting the under assessment. For 1933 the exhibit shows that there was an over-assessment of 19.32% by this method. The schedule 2 of this exhibit shows an apportionment to North Dakota on the basis of mileage of tracks operated and the three use factors, the four factors being averaged. The figures shown in the first four columns are the same as in the preceding schedule. The final results shown by this method in the last column show an under assessment in each of the four years preceding 1933 and an over assessment in 1933 of 18.05%. The third schedule, by the way, the stock and bond value, capitalized value and the composite value in each of these five schedules are the same as to the system figures. The third schedule shows an apportionment to North Dakota on the basis of mileage of all tracks owned
and operated and leased and operated and the three
225 use factors, the composite percentage shown in the
fifth column as being an average of the four factors. The final results show that the assessment for each of the four years preceding 1933 was less than the composite value assigned by this method. In 1932 the assessment was only 92.57% of the composite assigned value.

I read the figure for 1931 instead of 1932. The 1931 assessment was 92.57%. The over-assessment for 1933 amounted to 115.27%. In Schedule 4 an apportionment is shown to North Dakota on the basis of trackage operated, physical property and the three use factors, the three use factors being transportation service, traffic units and gross revenues. This schedule shows somewhat different results. An over-assessment in 1929, a slight under-assessment in 1930, the assessment in 1931 was 100.41% of the composite assigned value; in 1932 the assessment was 104.29% of the assigned value and in 1933 124.52% of the assigned value. The fifth schedule shows an apportionment on the basis of six factors, the six factors being averaged to find a composite percentage; the factors used were trackage operated, physical property, transportation service, traffic units, gross revenues and net revenues. The final column shows that the

assessment in 1929 was 101.29% of the composite assigned value; in 1930 96.25%; in 1931 97.33%, in 1932 101.40% and in 1933 121.72%. The exhibit shows that by most any combination of factors you might use that there was no appreciable over-assessment of the Great Northern Railway Company property in North Dakota during the years 1929 to 1932 and that a considerable under-assessment is shown by some of the methods. In this exhibit I have gathered together all of the common methods of allocating railroad values and one that probably is not common (tracks owned and operated and leased and operated). The exhibit
226 tends to show that by most any method of apportionment the valuation of the Great Northern Railway Company property in North Dakota for the years preceding 1933 was very well justified. I might say in that connection that expert appraisers frequently differ as much as 20% in valuing small property and that there is no method of valuation that will produce exact results whether it is a railroad or an appraisal of a house or any other piece of property. When I say that one of these schedules shows an over-assessment, I do not mean to say that the schedules used in this table or any combination thereof represent an exact mathematical statement of the true value of the property. Any method of valuing a railroad is merely evidence of value. The State Board of Equalization in North Dakota in deliberating on railroad assessments considered the evidences of value as presented in the briefs of the railroad companies and the evidences of value as shown in exhibits prepared by the Tax Department for their use and just what their final conclusions as to the assessments were, were, I believe, based upon their judgment in part and in part upon what the statistical data that they considered indicated.

(The document marked "Defendant's Exhibit P" was offered and received in evidence and is included herewith as Defendant's Exhibit P).

I prepared Exhibit Q which is the same as Exhibit P with the exception that I have capitalized earnings at 5% instead of 6%. The purpose in part of this exhibit is to disclose the difference which would be accomplished by the use of the different percentage of capitalization, and in part it is my opinion that the capitalization of net railway operating income at six percent in 1933 probably would not take into consideration the condition of all other properties in the state.
To pick out one particular property, class of property,
227 and capitalize their earnings and give them special consideration on the basis of earnings and forget about

the earnings of all other classes of property, what other property owners are receiving on their investment and you have given a favorable consideration to the class that is set aside where value is determined solely on the basis of earnings. I mean that it would constitute a special privilege. It was my opinion that on account of the extraordinary conditions existing in this state and in the Northwest in 1933 that 5% would have been a fair rate to use in the year 1933. I have set up the four preceding years just for purposes of comparison. The final result of the methods used in Exhibit Q show an under assessment for each year prior to 1933 according to each of the five methods of allocation. I don't want to be in a position, however, of arguing that a 5% rate is normally a fair rate of capitalization; I only think that in view of the extraordinary conditions existing in 1933 that some consideration should be given to other property owners in the state.

In that connection, I have prepared other exhibits disclosing the situation to which I refer.

(The document marked "Defendant's Exhibit Q" was offered and received in evidence and is included herewith as Defendant's Exhibit Q).

I prepared Exhibit R from the annual reports of the Great Northern Railway Company to the Tax Commissioner. This exhibit is headed the C. F. Balch method. Mr. C. F. Balch is a railroad man, statistician and expert, for the Chicago & Northwestern Railway Company. This method as set out in this exhibit has been used by Mr. Balch for a number
228 of years and quite a few cases in Federal Courts have been decided on the basis of the method that he has promulgated.

The system value is found exactly as we have set it forth in previous exhibits. Mr. Balch uses the five year average stock and bond value and the capitalization of net railway operating income at 6%, and that is what I have done in this case. I would then find the composite system value and this composite system value divided by the number of miles of track on the entire railroad system to find the average value of a mile of track. Then in order to assign values to North Dakota under this method it is necessary to find the relative worth of a mile of track in North Dakota as compared with a mile of track on the entire system, and this method measures the relative worth of a mile of track in a particular State by a comparison of operating revenues, traffic units and use of rolling stock, car and locomotive mileage for the sys-

tem and for the State. In this exhibit I find that in the five year period ending December 31, 1930, operating revenues per mile of track were 91.31% of system average; traffic units were 91.29% of system average; car and locomotive mileage 97.72% of system average. The method then involves what you might term an equation. The miles of track of the entire system were worth collectively per mile—38,187 miles of track in North Dakota collectively were worth on the basis of operating revenues 91.31% of system value or $34,869 per mile; on the basis of relative traffic units North Dakota trackage was worth 91.29% of system average or $34,861 per mile; on the basis of relative use of rolling stock per mile of track North Dakota trackage was worth 97.72% of system average or $37,316. These three values are then added and divided by three to find the value of a mile of track.

229 As represented by these three averages a mile of track in North Dakota is found to be worth $35,682. This is then multiplied by the miles of trackage in the state to find the total value of the property in the state, which amounts to $85,927,608, as compared with an assessment that year of $82,999,997. This exhibit shows an under assessment that year of 3.41%, the assessment being only 96.59% of the assigned value. This exhibit deals with the assessment for the year 1931.

(The document marked "Defendant's Exhibit R" was offered and received in evidence and is included herewith as Defendant's Exhibit R).

Exhibits S and T show the computations of the railroad assessment on the basis of the Balch method, which I have just described for the years 1932 and 1933. Exhibit R covered the year 1931 and these two exhibits cover the years 1932 and 1933 in exactly the same manner. The values assigned to North Dakota for 1932 by the Balch method is $78,892,878 as compared with an assessment of $78,850,024. In other words, the assessment was 99.95% of the assigned value. For the year 1933 the aggregate value of the Great Northern Railway in North Dakota as reflected by the Balch method was $66,075,109 as compared with an assessment of $78,832,888, the assessment being 119.31% of the value assigned by this method.

(The documents marked "Defendant's Exhibit S" and "Defendant's Exhibit T" were offered and received in evidence and are included herewith as Defendant's Exhibit S and Defendant's Exhibit T).

Each one of these is on a five year average.

I have prepared the table marked Exhibit U.

230 Mr. Dorety: If it please the court I would like to object to the introduction of any testimony regarding this exhibit or to the introduction of the exhibit itself on the ground that the information that it contains is immaterial to any issue in this case. The exhibit appears to be a comparison of assessed value of farm real and personal property with farm income, and my first ground of objection is that the rate of assessment of farm property is not in issue in this case. The complaint alleges and the answer admits that it was the duty of the assessing authorities to assess other property at its fair value and even in the absence of an issue to that effect, it is to be presumed that they have done so unless the fact is brought in issue in some way, which has not been done in this case, so I submit that while the witness has made remarks from time to time about what has been done in the case of farm property, I think all that testimony is inadmissible and immaterial in this case. I think that this sort of an exhibit is particularly susceptible to objection because it is not a comparison of farm assessment with farm value, but it is a comparison of farm assessment with farm gross income. No one has ever claimed that the value of property can be determined from its gross income. Some lines of business and in some classes of property the gross income may be the same as the net, take bonds. In other classes of property the expenses may eat up 90% of the gross income, so that the net, which is really the thing that determines value, would be only 10% of the gross. You might put in an exhibit like this comparing Government bonds instead of farm property and you would find a very different ratio there between assessment and gross income. There the gross income would really be a measure of value because it is the same as net; but take a railroad property where

231 ninety cents on every dollar or more may be expended in operations and a comparison would distort the facts by a thousand per cent, and it seems to me that if such a comparison as this were to have any value at all we would have to go into the investigation of what the net income from farm property is as compared with net railway income and to determine that would take months of hearings as to what the net income from farm property is, so that I object to this line of testimony on the two grounds, that the propriety of farm assessment is not in issue, and on the second ground that if it were that the ratio of assessment to gross income has no

bearing whatever and cannot aid the court and it is utterly immaterial.

The Court: I have not read your bill but I rather understand from what you say that your bill does not allege any disparity or arbitrariness on the part of the Board because of the different assessment of farm property in a different ratio to railroad property.

Mr. Dorety: No.

The Court: You do not make that an issue.

Mr. Dorety: No, we are not alleging discrimination in this case as is sometimes done in railroad tax cases where it is alleged that a farm property is under assessed. We assume that all property is properly assessed except our own.

The Court: I will hear from you Mr. Shaft.

Mr. Shaft: If it is counsel's contention that it is immaterial that other property in the state has been overassessed in the same percentages or greater percentages than the railroad has, then it would seem to me that his contention is entirely without merit in this action where we are in a Federal Court which has jurisdiction over this action only because equity will take jurisdiction in case of a discrimination. Discrimination is a necessary element in their case.

232 If all property is assessed at 150%, how is the railroad property discriminated against if it is assessed at 150%. The second proposition is simply this, that this table we do not contend to have any binding force, we offer it simply for the purpose of showing the general trend of farm income compared with railroad income for the purpose of showing that the Board of Equalization in assessing railroad property, which is frequently and usually assessed upon the basis of arbitrary formulas, was justified in making an assessment considerably in excess of the results produced by these arbitrary formulas, because of the fact that all property in these times is suffering from a lack of earning power, from a shortage of gross income, from a depression which justifies the Board of Equalization in taking those things into consideration and in refusing to adopt or accept the specific figures produced by these arbitrary formulas.

The Court: The impression I got was this, that your offer of this exhibit was for the purpose of bringing to the attention of the court that the farm property assessment in 1933 was over-assessed in comparison with the plaintiff in this case; therefore, there could be no discrimination.

Mr. Shaft: I do not believe that we could claim that much for the exhibit because I do not believe that the relationship between gross income and actual value of the property is that closely connected so that we could make that claim for the exhibit.

The Court: Then what is the purpose of the offer?

Mr. Shaft: We offer it for the purpose of showing the utter unfairness of applying these arbitrary formulas strictly in the case of the railroad and giving no consideration to gross income or things of a similar nature with reference to farm property.

The Court: The court will reserve a ruling on this at this time. I want to look at the exhibit a little more and consider it. I want both parties to get in all the record they desire to have within reason, that they may in
233 good faith think it pertinent to the issues involved, although the court may not give a great deal of consideration to some of it in deciding the case. I will reserve a ruling at this time.

(Whereupon the witness proceeded as follows):

I would say that the exhibit shows a loss to farm income over a period of years, both gross and cash income and tends in a general way to prove a very large loss in farm values. The exhibit does not prove anything conclusively but it gives a general picture of the economic situation that existed in North Dakota at the time that the State Board made its assessment in 1933. The Board was confronted with a tremendous deflation in farm values and that deflation is exhibited or portrayed in this exhibit and other exhibits in a general way. This exhibit indicates that there may be a disparity between railroad and farm property taxation. This table show a much larger percentage loss in farm income than in railroad income both as to gross income and cash income.

Mr. Dorety: It may be understood that all this testimony is objected to, Your Honor?

The Court: Yes.

I will call attention to some of the percentages. During the five-year period, 1924 to 1928, the assessment of farm property averaged 353% of gross income and 386% of cash income. During the four-year period, 1929 to 1932, the assessment of farm property averaged 822%of gross income and 944% of cash income. In the year 1931 the assessment of

farm property was 1047% of gross income and 1277% of cash income. In 1932, the assessment of farm was 1045% of gross income and 1230% of cash income. During the five year period from 1924 to 1928 the exhibit shows that the assessment of the Great Northern property averaged 380% of gross in-
234 come, and during the four-year period, 1929 to 1932, the assessment for the Great Northern averaged 501% of gross income. This compares with 822% as to farm assessments. In a general way the table indicates that the Great Northern Railway property has received more favorable treatment than farm property in the assessments. The drop in gross income from farm production from three hundred million in 1924 to seventy-one million in 1932 roughly indicates the drop in value of that property. The assessment, however, was reduced only a small percentage as compared with the drop in income.

Mr. Shaft: We offer in evidence Exhibit U for the purpose of presenting a picture of the economic background with which the State Board of Equalization was confronted at the time of making the 1933 assessment.

Mr. Dorety: And I object to it, if it please the court, on the ground that such information as this does not even have a remote bearing on the economic background. You might as well count the number of dandelions on the farm per year and say that that has some relation to it; you cannot get the remotest idea of what farm property was worth from its gross income, it is an utterly irrelevant factor and it can only be made relevant by guessing about how much of the gross is net. If it is material at all it must invite an issue in the case as to what farm expenses are and how much is loss, and, therefore, what the farm value is, and that would be an issue which is not pleaded and would take us a month to try out.

The Court: I am inclined to think at this time that the exhibit does offer an issue in the case that the plaintiff would be entitled, if you should so desire, or if it desired to dis-
prove the suggestion that the gross receipts and cash
235 had a tendency to prove the net, but I want to think about it a little more and I will just reserve a ruling on it until the evidence is in here; I am just suggesting at the present time I do think it tenders a new issue here. I will consider it a little further and reserve my ruling.

(Whereupon the witness proceeded as follows):

In connection with this exhibit the terms gross income and cash income are not defined. Gross income and cash income

is defined in the bulletins of the United States Department of Agriculture and are given as follows: "Gross income relates to cash income, plus the value of the products consumed in the farm household on the farm where the commodities were produced. Cash income relates to the value of quantities actually sold off the farms of the state where these were produced". The gross income and cash income of crops are credited to the year in which the commodities were produced, evaluated at prices received during the marketing season for the particular crop. Gross income and cash income from live stock production are computed on a calendar year basis, evaluated at average prices for the calendar year. This exhibit does not tend to show value but merely measures the loss in value as indicated by loss in gross income.

Mr. Shaft: Now, if Your Honor please, we have four or five more exhibits of the same general tenor, giving the picture in a little more detail and a little different methods of comparison. We proposed to offer them and we have no objection to their being all offered subject to the objection of Mr. Dorety, and in order that the record may be saved we will stipulate at the outset that all of the testimony and all of the offers with respect to these several tables on farm income may be offered subject to Mr. Dorety's ob-
236 jection and may be received subject to the reserved ruling of the court and that will save a little time and record.

The Court: All right.

Mr. Shaft: That is Exhibits U to Z, inclusive, it will be and that objection and stipulation will stand to Exhibit Z-1 as well.

The Court: Very well.

(Whereupon the witness proceeded as follows):

The information in Exhibit V that is my table No. 30, was secured from the same sources as the last exhibit. The general purpose of the exhibit is about the same as the last one, to show the decline in farm gross and cash income in more detail than was shown in the last exhibit, and to give a comparison of railroad assessments and farm assessments in somewhat more detail from a somewhat different point of view. This table contains a number of index figures, the index numbers used in the exhibit show the relation of all figures to figures for 1924 and the 1924 figures are used as the basic figures to measure the rise or decline in income and

in assessments. Referring to the index figures shown opposite gross farm income we find that the decline in farm income was somewhat irregular up to 1928 when farm income stood at 83% of the 1924 figure. I am referring to gross income. In 1929 the index figure was 71, in 1930 the index figure stood at 49; in 1931 it stood at 24 and at 24 in 1932. Comparing these figures by gross revenues of all railroads of the state we find the gross revenues increased from 1924 to 1928, when the index figure from all gross revenues of railroads in North Dakota stood at 120 as compared with the base year 1924. In 1929 the index figure was 110; in 1930, 91; in 1931, 66; in 1932, 51. The final column in the first schedule of the exhibit shows the relation
237 between gross income from farm production and gross income and gross revenues of railways. In 1924 railroad gross revenues were approximately 15% of the farm gross. In 1931 railroad gross in North Dakota was 42% of farm gross and in 1932 33% of farm gross.

The next schedule presents the same picture with reference to cash income from farm production. Cash income fell from 100% in 1924 to 22% in 1932. In 1931 railroad gross revenues in the state amounted to 51% of cash income from farm production, 39% in 1932, and the final schedule on the table gives index figures relating to the assessment of farm property and railroad property. In spite of the continuous drop in farm production the assessment of farm property stood at 98% or 97% of the 1924 figure up until 1930. In 1931 it dropped to 81% of the 1924 figure, 80% in 1932 and 72% in 1933. The index figures for railroad assessments stood at about 97% for quite a number of years in the period from 1924 until 1930, it dropped to 94% in 1931, 86% in 1932 and the same in 1933. The final column in this schedule shows that the assessment of railroad property for seven years, 1924 to 1930, stood at about twenty-one and a fraction per cent of the assessment of farm property. In 1931 the percentage rose to 24.72% and it has developed for the [—] 1932 it stood at 23.03% and in 1933 25.37%, but for seven years out of this period the variation was constant in the assessment of the two classes of property in spite of the fact that the farm income dropped a very much greater percentage than the income of railroads in the state.

Referring to Exhibit W, the important figures in this table are the percentages derived, and the ratio of 1931 gross farm income to the five year average 1924 to 1928 was 27.91%, cash income in 1931 was 25.07% of the 1924-1928

average. Railroad income for 1931 was 64% of the
238 1924-1928 average. In 1932 farm income, gross income, was 27.39% of the 1924-1928 average, cash income 25.60% and railroad income 48.55% of the 1924-1928 average. Comparing the four-year period, 1929 to 1932, with the previous five-year period on the basis of average annual income, we find that farm income was 38% of the 1924-1928 average, farm gross income; cash income was 36.93%, while railroad income was 75.81% of the 1924-1928 average.

Exhibit X gives a statement of the taxable value of all property and of farm property for the years 1917 to 1933 and shows the ratio of farm property taxable value to the total taxable value of all property for the years 1917 to 1933. The ratio of the farm assessment to total assessment increased decidedly in 1919 as compared with the previous year. When changing from a 30% tax base in 1918 to 100% taxable value in 1919 railroad property was raised 233% while farm lands were raised 384%. Both classes of property were required to be assessed at 30% of full value in 1918 and at 100% of full value in 1919, but in changing from a 30% tax base to a 100% tax base farm lands were raised 151% more than railroad property was and that equation of that year was ironed out to some extent in the next few succeeding years and the ratio of farm property to total properties stood around 69% approximately for some years prior to 1929 and it has now dropped to 64.66% of the total assessment, the drop being in the last three years. The figures shown in this table are presented largely because of the fact that I have made an estimate of the tax burden on farm property for a period of years, which is presented in another exhibit.

Exhibit Y shows the average tax rate on all property subject to the general property taxes for the years 1920 to 1933 and is shown because it is used in Exhibit Z.

Exhibit Z purports to be an estimated property tax burden
239 on farm lands and farm personalty. I made the estimate. The exhibit shows taxable value of farm property, including both farm lands and farm personalty. The second column in the exhibit shows the average tax rate on all property and the third column shows the estimated tax rate on farm property. While the tax rate on farm property is somewhat lower than the average tax rate in the state, in this third column I have estimated that the tax rate on farm property is 87% of the state average. This estimate was based upon a detailed and exhaustive analysis of

tax reports in the various counties of the state made in, I believe, three different years in which the same average figure was developed. That work was done at the time I was in the office of the State Tax Commissioner. A detailed record of that was lost when the Capital burned, but that estimate is what I believe to be an accurate estimate of the tax burden on farm property. The school poll taxes, motor vehicle license taxes and gasoline taxes have not been included; state and federal income taxes have not been included. The tax burden on farm owners and operators in this table is measured by taxes imposed on property used in the business of farming and on farm household goods, clothing and other personal property. I have not attempted to make any estimate of the gasoline taxes paid by the farmer or other special taxes, merely the general tax burden on farm property.

Exhibit Z-1 gives a comparison of general property taxes on farm property with gross income and cash income from agricultural and live stock production, and also gives a similar comparison of taxes with gross income for the Great Northern Railroad. The comparison covers the years 1924 to 1932, inclusive. The first schedule shows that in 1924
farm taxes were about 6% of gross income. In 1929
240 they had risen to a little over 8%. In 1930 farm
taxes were 12% of gross income; in 1931, 21.75% and in 1932, 18.20%. The final column in that schedule gives the index figures for farm income as compared with 1924. In the second column the comparison of taxes on farm property with cash income shows that in 1924 farm taxes was 6.46% of cash income; in 1929 taxes had mounted to 9.26%; in 1930 the rate was 13.89%; in 1931, 26.53% and in 1932, 21.42%. The final schedule on the exhibit gives a comparison of Great Northern Railway taxes, that is taxes levied on operating property, with gross operating revenues and shows that while taxes were 8.85% of gross in 1924, had fallen to 6.84% in 1928, were 7.75% in 1929, 1930 the ratio of taxes to gross operating revenues was 9.62%, in 1931, 13.18% and in 1932, 13.76% and in 1933, 12.82%. Comparing the Great Northern taxes with farm taxes in relation to cash income of the farmer, we find that in 1930 when the farmer was paying 26% of his cash income for taxes the Great Northern was paying about half that. In 1932, when the farmer was paying 21% of his cash income for taxes the Great Northern was paying between twelve and thirteen per cent. While this exhibit does not tend to prove what the value of the Great Northern Railway property in North Dakota may be, it does show the enormous tax burden on the

principal other item of taxable property in North Dakota; it shows an enormous increase in the burden of taxes in relation to the farmer's income. I might say that there are a number of other estimates have been made on the relationship of farm taxes to farm income and that these figures are decidedly conservative as compared with certain estimates gotten out by the Agricultural College experts.

(Whereupon Exhibits V, W, X, Y, Z and Z-1 were offered in evidence subject to plaintiff's objection, and the witness testified as follows upon examination by Mr. Dorety).

241 The gross income from farm production figures and the cash income also are offered not to show value of farm property but changes in value. I did not contend that because Exhibit U shows $211,000,000 gross income in 1929 and $71,000,000 in 1932, that therefore farm values in 1932 were 1/3 of 1929. I think in measuring the loss in value of any class of property you must take into consideration average income for a period of years, I would not say that one year determined—

Taking the 1924 to 1928 period, $260,000,000 and the following five years $100,000,000, it would be my opinion that that indicated a decrease between those two periods.

In the case of railroad property, I would say that the best measure of change in value is change in net revenue rather than in change of gross revenue. Taking a change in net on the railroads from an average five-year period ending in 1929 as compared with 1932, I would not say this would show a reduction of value to 1/30 because in measuring loss of value on the basis of income, I do not think a single year has any significance. You must take a period of years. If you take a period of five years ending in 1934 with an average of around $10,000,000 and the 1929 five-year period around $30,000,000, that would show a loss of railroad value down to 1/3, to the extent that relative income indicates loss in value, and yet the gross revenue on railroads only shows 1/2 loss.

It is true that in an exhibit like Exhibit U, where the lower part of it considers railroad figures, if instead of using the gross total operating revenues, I had used net revenue figures, I would show in the last column, instead of a change from 424% to 751%, which is less than double, I would
242 show a change of probably 1000% difference in those percentages, and I think if you had compared figures for net farm income you would have to signify the change by infinite because net farm income no longer exists, it has been

wiped out. There is no way to consider the net income of the farmer except by approximation without doing a vast amount of research work, which would take many months, and that probably would not be accurate when you had it, but we know in a rough way that $72,000,000 gross don't cover the cost of farming operations.

In my farm value figures on these exhibits, there is nothing for value of farm improvements because they are not assessed at all and have not been since 1918 or 1919, so that to the extent that the farmer's improvements escape taxation, he is at least given some privilege that the railroads do not have. That is also true of seed, which is exempt in the hands of the farmer.

Mr. Dorety: I just want to submit those replies for your Honor's consideration as tending to support my contention that these gross revenue comparisons have no value whatever to the extent that if they are given any weight they are found to be misleading, they could not lead to an accurate result.

(Whereupon the witness on further examination by Mr. Shaft testified as follows:)

In my testimony, I have not meant to indicate that any computations which I made or which others made were the computations of the State Board of Equalization.

Referring to the compromise settlement of an action brought by the Soo Line railroad in connection with its 1933 assessment, I was employed by the state in connection with that action and prepared the figures upon which that settlement was based. The basis of the settlement of the suit brought by the Soo Railway Company involving their
243 1933 taxes was parity in their assessment as compared with the Great Northern Railway property. We determined the relationship between the actual value and the assessed value of the Soo and of the Great Northern and the Soo was brought down to a parity with the Great Northern under the terms of that settlement. Referring to Mr. Turnburke's method of apportionment of system value among the states upon a basis of cost of service, in the first place Mr. Turnburke has attempted to test the accuracy and validity of the 1933 assessment of the Great Northern on a basis of a method of apportioning railroad values that never has been used and that never has been advocated by the Great Northern and that has never received any recognition in court. The theory in my opinion is based upon fundamentally wrong principles as well as upon false premises. In the first place

it assumes an idealistic rate structure, in which all rates are based upon cost of service, including a percentage return upon the cost of the property. It assumes that that rate of return is uniform in every state. In other words, it assumes an impossible situation. With hundreds of freight rates being considered at all times by the Interstate Commerce Commission it is quite apparent that the rate structure is not idealistic. The method evolved by Mr. Turnburke gives no weight to the character of the traffic in any state, whether the traffic is high grade or low grade traffic, and secondly no weight is given to the revenues received from the traffic within the state. It is a denial of all facts relative to the geographical area in which the traffic is carried on. It throws all interstate revenues into one single jackpot and then apportions them over the entire system and over every state on the system on the basis of cost of operation. It is based partly upon the theory that
244 rates are everywhere adjusted to costs of service, whereas rates are largely fixed on a competitive basis, the rates on all commodities are not the same, rates are fixed according to the value of the commodity carried to a greater extent than they are on the cost of service. Another objection is that I think that it is apparent that the method assigns to Washington and certain other Western States revenue from traffic that don't ever go into those states, it never gets out of the North Dakota-Minnesota territory; it is all thrown into one jackpot and parceled out on a cost plus basis.

The formulas that I have used in this case to a great extent are the ordinary and usual formulae that have been given recognition either by the courts or are in general use by taxing bodies, and the State Board of Equalization gave such weight to the data as the Tax Commissioner presented to the Board as in their judgment it was entitled to. I cannot give any testimony as to just what weight was given to the evidence presented to them. There was two classes of evidence, that presented by the Tax Commissioner and that presented by the Railway Company.

These formulas which I have presented together with the various combinations of factors were at various times presented to the Board of Equalization by the Tax Commissioner, and the railroads did the same sort of thing. I never heard of the railroads making the contention that railroad property should be allocated among the states on the basis of cost of service. On the contrary the various railroad tax commissioners and representatives that appeared before the State Board of Equalization of North Dakota over a long period of years stated, I think each and every one of them

from time to time, that the net earnings method of allocating railroad values was totally inaccurate because of the fact that gross operating expenses by states could not be accurately determined.

245 Cross-Examination.

By Mr. Dorety:

The taxing authorities of North Dakota to some extent have free access to reports and records on file with the Railroad Commission. There is ordinarily no limit on that except when they are in use.

Exhibit P is really the culmination of all my previous exhibits. The previous exhibits are for the purpose of producing figures to be used here or else for the purpose of justifying the methods that I used here. I believe it is correct that schedule 4 on Exhibit P showing the five factor ratio is the one which is advocated by the state as the fairest basis of allocation. That shows the 1933 assessment to be 24½% in excess of my computed value by the composite method in Schedule 4.

If in the first column instead of using five year stock and bond figures, I had used one year or three or even four years or anything less than five years, I would obtain a smaller valuation in North Dakota and show a greater over-assessment. And if in column 2 I had used anything less than five years, I would also show a lower valuation of the railroad. It is also true that if I had allocated my stock and bond value as to operating and non-operating properties in proportion to income produced alone, that would have decreased the North Dakota value and increased the over-assessment. In using the two factors to make that apportionment, I was influenced by the fact that you were comparing unlike income. Using investment there increases the Great Northern's North Dakota value and decreases the over-assessment.

Also, according to the figures presented by the plaintiff, if in the fourth column I had prorated interstate revenues in proportion to the cost of service as Mr. Turnburke did, I believe that would have decreased the North Dakota value and increased the over-assessment.

I have been working on these exhibits off and on for several months. I think I started working on the Great
246 Northern exhibits in May and have been devoting a large proportion of my time to it for several months. The only other method that I tried in addition to the computations that have been offered in evidence here was the so-

called Haugen method. In all that time I was not able to find any method of computation that would produce a value to North Dakota equal to the assessment for 1933 by any usually accepted method.

Referring to the matter of using five year stock and bond figures, instead of a shorter period, if we were just trying to determine the actual price that property would sell for, I would give controlling weight to current sales if there were any. If land were selling today for $100 an acre and if there were plenty of sales at that price, I would not go back five or ten years when it was selling for $50 an acre and average those prices. You never follow a boom all the way up in appraising land for tax purposes or other purposes. I would be willing to agree that under ordinary normal market conditions and for anything except the purpose of a tax case, current stock and bond prices are the best evidence of commercial value. Where the conditions are abnormal, I would not agree that the current prices should have more weight than prices five years old, when the usual and ordinary method of valuing that property consisted in taking the five-year average. Leaving the tax question out of the case entirely, if I were buying the property, I would want to buy it on the present day market and not what it was worth five years ago and any other investor would.

I presume that when a man pays $15 or $20 for a share of Great Northern stock today, which is paying no dividends and no immediate prospect of any, he has in mind the fact that five years ago it sold for $125. Most persons if they paid $125 for a share of stock would figure it a loss if they had to sell it for $15 today. I cannot see that when you determine the average stock and bond prices of today, you are al-
247 ready giving some effect to the prices of five years ago. I think the bond prices of the Great Northern reflected the fact that bond interest was not being earned and bonds were selling to bring ten to eleven per cent to maturity and under normal conditions the bonds should not bring half that. Stock prices might have been in part reflecting the higher prices of five years ago. When you average five year prices, you are giving 20% weight to each year of the five year period, but if it is a fact that the last year is higher because the first year is higher, you are raising your avarage twice by reason of the fact that the first year was high.

I would say that if one company had been having a steady increase in stock and bond prices and another a steady decrease, but the five year average being the same, with the

result that the current price of one was very much higher than the current price of the other, the former would have an actual present commercial value greater than the latter. In other words, I would give some additional weight in that kind of a case to the current figures.

In Exhibit B, I get a five year stock and bond value of about $514,000,000. If I had deducted from that, not the market price of the bonds which formed a part of the figure, but the full par value of the bonds, the amount you would have to pay to pay them off, which was $350,000,000, I would have left for the value of the stock $164,000,000, or something like $65 a share, and that is probably six or seven times what the stock was actually selling for on the average during 1932 and 1933. Nevertheless, if you are using a five year average all the way through in the long run there is no over assignment except stability in the assessment.

I am admitting that for commercial purposes the use of five year figures might be a little grotesque, but I justify it on the ground that the state has always used it and that over a long period of time it will produce the same result as if you used single years, and in addition the fact that stock
248 market values of a single year may be grotesque.

If I am going to justify the use of a five year period with its currently grotesque result on the ground that over a long period of years it works out, consistency requires that I stick to it when it goes down as well as when it goes up. For this reason, the assessment for 1933 which is 24% above my computed value appears out of line.

It is somewhat correct to say that if we are going to adopt a policy of appraisal that would be followed for commercial purposes, we would be compelled to take less than five year figures, therefore, would get a much lower valuation and the assessment would be even more excessive than it appears here, and, on the other hand, if to avoid that dilemma we adopt the rule of using five years because it was the custom and works out justice over a long period, I absolutely condemn our assessment for violating that rule.

In order to get the figures in column 1 of Exhibit P, I apportion the total of all stock and bond prices between operating and non-operating assets, half in proportion to income and half in proportion to investment and use seven years average instead of five years on the income.

On Exhibit I, I developed an income ratio for 1933 of 34.36% on the basis of seven years. If I had used the basis

of five years that percentage would be 36.71%. If the stock and bond value were apportioned on the basis of income alone, by using five years I would give 2½% more to the non-operating property and 2½% less to the operating property than if I used seven years. And that 2½% applied to a $500,000,000 total value would reduce the value of the operating property about twelve and a half million dollars and the value of the property in North Dakota about $2,000,000.

Referring to the use of investment as a ratio of apportionment, if I had a $10,000,000 property that had fallen into losses and was producing a return on only $1,000,000,
249 and if I had another property that only cost $1,000,000 but had proved to be a very fortunate investment and were earning a return on $10,000,000, by using a composite of investment and income, I would give equal value to the two different properties. As a matter of fact, the one that cost $1,000,000 but was earning a return on $10,000,000 would be very very much more valuable than the one that cost $10,000,000 and proved less profitable. It is ordinarily true generally that income over a fair period of years is a much more accurate basis of apportionment than investment. When investors buy Great Northern stock and bonds they are governed almost entirely by the company's income from that source and very little from the amount that is invested.

I would not agree, however, that for the purposes of determining the apportionment of stock and bond value between operating and non-operating properties, the fair thing to do would be to give most, if not all, of the weight to the income ratio, and very little if any to the investment ratio, because you are comparing unlike income. When a man buys stock and sees that last year the company earned $2 a share or $8 a share or whatever it may have been, that is the figure that governs his action in buying or not buying, regardless of where the income comes from, but when you compare mortgage income with stock income on the basis of the percentage relation, you would probably get an inaccurate result in assigning value. It is true that what you are trying to determine here is the extent to which Great Northern stock and bond prices are affected by the non-operating property. In buying stocks or bonds of the Great Northern, the ordinary market investor does not stop to analyze the sources of the income that is paying his dividends, as to whether that income comes from stock and bonds of subsidiaries, but I think the informed investor does. At any rate, if instead of
250 following my method of apportionment which produced 30.29% for non-operating property in 1933 on

Exhibit I, I had used income alone for five years, I would have a percentage of 36.71% for the non-operating property instead of 30.29%, a difference of about 6½%. And correspondingly, I would have apportioned 6½% less of the total stock and bond value to the railroad and that would be about $32,000,000 less, which would have reduced North Dakota value about $6,000,000.

Referring to the second column of Exhibit P showing the capitalization of the five year earnings and considering a valuation for commercial purposes, I do not think that a property with earnings falling from $31,000,000 a year to $1,000,000 a year in five years would be as valuable and would have as high an appraisal as one with earnings which had been ascending from a million dollars five years ago to $31,000,000 today. I would appraise the company with ascending earnings much higher, even though the five year average of the two were the same, and I would agree that for commercial purposes at least, if a five year figure were used at all, the later years should be weighted.

Possibly, for commercial purposes to a limited extent, the number of years earnings that should be considered for capitalization varies according to the kind of property you are valuing and the circumstances surrounding it. If a railroad has been struggling along without earnings for a good many years and then during the current year some big iron mines are discovered and open up or some forests are opened up or something happens that produces high earnings during the last year with the probability of similarly high earnings in the future, I would say that in that kind of a case you should take just the last years earnings and disregard the prior years when conditions were different, if there was a prospect that those earnings were going to be continued. In other words, if conditions had radically changed, I would consider
the earnings subsequent to the time the conditions
251 changed if they appeared to be permanent.

On the other hand, if I had a railroad like your ore lines that had been doing a very heavy ore business up to five years ago, and then for some reason the ore mines were closed down during the current year but were about to be reopened, there is a case where the single years earnings five years ago might give a better index than any other average. In considering the number of years earnings which we should capitalize for the Great Northern Railway, we should apply the same kind of a test and consider to what extent circum-

stances have permanently changed, if we can forsee the future, before we determine how many years earnings we should capitalize.

Referring to Mr. Beidelman's testimony that, without necessarily foreseeing the future, certain volumes of traffic have been lost which the Great Northern formerly had, and that those changes appear to be permanent at least for the present, the argument that earnings of the last three years are more in accord with probable future conditions than earnings of five years and that we should capitalize three years rather than five years in determining present value, has merit. However, I would not say that in the second column of Exhibit P we should use something less than five years earnings for capitalization, if the policy of the State Board had been to use five year averages at all times during boom markets as well as during declining markets. Here again, however, if we are going to justify the use of five year figures solely on the ground of rigid adherence to continuous policy, we again necessarily condemn the 1933 assessment for not adhering to that policy, but that is modified by other conditions and circumstances existing in that year as to all other properties. Under the present outlook, I would admit that if
252 we were making an appraisal of the property for commercial purposes, we would probably get more accurate results by using something less than a five year period.

By using a five year period, the total earnings for those five years were something under $100,000,000, and out of that $100,000,000 about sixty-one or two million dollars were in the boom years 1928 and 1929. If I were buying the property, I would think that to throw in $63,000,000 of boom earnings that are four or five years old with thirty-six or seven million of depression earnings that are current would be giving a little too much weight to the boom figures. And probably present stock and bond prices show that actual investors are putting more stress on current earnings rather than on the earnings of five years ago.

My figures in column 2 on Exhibit P are the result of taking average earnings for a five year period and capitalizing them at 6%. I would agree that for the purpose of a commercial capitalization, we should use a rate of capitalization that would be required by investors in the particular enterprise and what that return would be would vary greatly with different enterprises. I presume that an oil well that might play out in two or three years might require a rate of 50% capitalization and a factory producing some fad like jig-

saw puzzles might have big current earnings and probably last a year or two and an investor there would require a higher percent than on a stable property. I am inclined to think that there should be some difference in rate of capitalization between different railroads where some had variable earnings and danger of traffic losses and labor troubles and others were old established roads of steady earnings. The rate would also vary with the number of years earnings that you were considering. If we were capitalizing the earnings of one year 1932 on the Great Northern which was only a million dollars, and the lowest the company ever had, and almost certain to be earned in the future, an investor would prob-
253 ably use a very low rate, and on the other hand, I presume that if we were capitalizing five years earnings 2/3 of which were boom year earnings with some question as to whether they would ever recur, an investor would want a higher rate of capitalization. The rate would be higher if you were capitalizing income from stocks than if you were capitalizing income from bonds.

I presume that four or five successive years of crop failure such as we have had in this territory might create some doubts as to the future in the mind of the investor and make him demand a little higher rate.

I don't think the year 1932 has any significance. 1933 was only half gone when this assessment was made and we had a new deal and bright outlook before us. Very little property in the United States was earning any appreciable rate in 1932 regardless of the class of property. Under conditions existing then, you could not get an investor to put his money into anything. He was trying to get rid of anything and put his holdings into cash.

Referring to Exhibits R, S and T, illustrating the Balch method that was originated some years ago and was used in the Eveland case which later came up in court about the year 1932. I do not know whether it had ever been used before then. Mr. Balch has advocated the use of five year stock and bond figures and five years earnings and 6% in the past, but he may have changed since the depression. I do not know whether Mr. Balch has any method of ascertaining the value of non-operating property. The system value on the Balch exhibits is exactly the same as Mr. Balch has followed in the past and the amount of non-operating property deduction is an estimate so far as any Balch formula is concerned. The system value on the Balch exhibit is the system value to a dollar that I arrived at in my own Exhibit P. The exhibit only shows the Balch method of apportionment and any criti-

cism that may have been made of the system value in
254 Exhibit P is also applicable to the Balch exhibits R, S and T.

As to whether the five factor ratio used in schedule 4 on Exhibit P and advocated in the defendant's answer is proper in all cases that is difficult to answer. I believe that there are circumstances and conditions sometimes that make the use of any particular factor inaccurate. If your ore lines were owned by a separate corporation and I were allocating the system value between Minnesota and Wisconsin, possibly the five factor ratio would not be a fair one. It could be criticized. I think it would give a correct apportionment. With 90% of the track miles in Minnesota and 90% of the locomotive and car miles in Minnesota, 90% of the ton miles in Minnesota and, if you used a mileage prorate of revenue, 90% of the gross revenue in Minnesota and only 50% of the physical property in Minnesota, you would get an average for the five factors of something like 80 odd per cent. Whether in that particular case an allocation based on cost of service as worked out by Mr. Turnburke would produce an accurate and fair result, I would want to test that out. I would not attempt to say without studying it. Without the Minnesota mileage the Wisconsin mileage would be of little value, and it is also true that without the Wisconsin terminals and lake navigation and opportunity to dispose of the ore, the Minnesota mileage would be of little value. You are trying to split up an indivisible thing. I would not be able to state whether an apportionment of revenue and value in that particular case in proportion to the cost of producing the service in each state if accurately determined would be a fair method. It has some merit undoubtedly. Any line of railroad is a unit and when you try to allocate values to any particular part of that unit it is a good deal like trying to divide up a horse and determine what part of the whole value the horse's leg might be.

The horse is no good without the leg.

255 Referring only to the apportionment of revenues and not value, I think that property investment should be given some weight as well as the relative revenues in that particular case. I don't get the philosophy or theory of apportioning value according to expenses because it is the opposite of value. Assuming that the ten mile terminal operation in Wisconsin costs 40c and that the 90 mile roadhaul operation in Minnesota costs 40c, and that the plants in Wisconsin and Minnesota have equal investment and cost and that the revenue is a dollar, I would not be able to point out any criticism to apportioning that dollar of revenue equally between the two states under those circumstances. I cannot see any re-

spect in which that method would produce unfair or inaccurate results and cannot point out anything of that sort.

Referring to a grain shipment from North Dakota to the Twin City terminals, it would seem to me that part of that cost which is incurred in Minnesota is on account of your North Dakota business. It might be true that if you should apportion the revenue on a mileage prorate instead of in proportion to the cost of the service, the result would fail to give Minnesota enough revenue to pay operating expenses and a return on its investment and that you would give North Dakota more than enough to pay for its service, although I have always thought that the originating expense on traffic should also be taken into account as well as the terminal expense. It has always seemed to me that if a certain portion of the railroad is more profitable that fact should be taken into consideration. I am not acquainted with the theory of apportioning value on the basis of cost of service. I would not be able to point out any unfairness in it in the instance that you now cite.

If one terminus of a railroad is 10 miles inside of the border of one state and the other terminus is 100 miles across the border of another state and if the 10 mile section
256 in the first state is obstructed by a mountain, and if two competing railroads are built between those termini, one of them reaching the border of the first state ten miles away by a roundabout line 100 miles long around the mountain so that on that particular railroad you would have 100 miles of line within each state, but if the second railroad reaches the border by a direct ten mile line through a tunnel in the mountain, the result being that the first line has 100 miles of track in each state or 200 miles in all, and the second line has ten miles in one state and 100 in the other, or 110 in all, and if the roundabout line of 100 miles in the first state costs just the same as the tunnel route of 10 miles and if both routes handle the same class of traffic at the same rates, I would not say that a five factor allocation of revenues would be fair on both of those railroads. I would not say that the railroad with the 100 mile roundabout route around the mountain should get half of the through revenues, while the railroad with the same cost of plant through the tunnel would only get 10%, which would be the case if the five factor allocation method were used for both of them. I would not consider that fair. As to an apportionment of revenue for both of those railroads in proportion to their operating costs in each state, plus a return on their investment, that is rather a complicated situation. I would not be able to point out any fatal defect in that method in that case. In the case of the

ore lines and in the hypothetical case just mentioned, I will admit that the five factor method would not produce correct results and that I cannot point out any fatal defect in the cost of service method of allocation.

In the last hypothetical case mentioned, you would not get any more fair results by using locomotive or ton miles than you would by using train miles and the result would be about the same. The same would be true of ton miles, or passenger miles. As a gross revenue factor with an apportion-
257 ment of through revenues on a mileage prorate, I think that all of those factors would probably produce an inaccurate result, and in the instance cited you would not make it any more accurate by combining three or four inaccurate factors.

In the case of the actual situation on the Great Northern where mileage was shortened by construction of additional tunnels in Washington, the shortening of the mileage was practically nil in treatment of percentage. It did, however, assign a very slight amount more revenue to North Dakota and other states. I do not know whether that is assigning an unfair advantage to another state which has already got a straight line. I do not know whether this is one weakness in the five factor allocation method.

As to whether it is necessary to give terminal states more than a mileage proportion of the through revenue, you are trying to break up what is an indivisible item of property. Any assignment of values to a state is arbitrary. I do not see why revenue should be apportioned on the basis of cost because of the difficulties of operation in a particular state. That does not mean that there is more value there.

In order that North Dakota may enjoy her revenue on shipments moving between Puget Sound and the Twin Cities, it is necessary that those shipments have a terminal handling on Puget Sound and also in the Twin Cities and that in order to give that terminal handling, terminal costs must be incurred. A part of those costs are incurred on account of the business in North Dakota and all other states on the line but the location of those costs is at the terminal. The revenues are derived from the entire shipment. The terminal costs must be included in the freight charges, undoubtedly, but in allocating the revenue, I do not know that it is neces-
258 sary to allocate back to the terminals enough to pay the terminal costs. The revenue is derived from transporting goods from one place to another.

If the terminals on Puget Sound and in the Twin Cities were operated by independent companies whose ownership was separate and distinct from the ownership of the road haul, and if the Interstate Commerce Commission finds that the cost in each of the terminals is 25c a hundred pounds and that the cost of the entire roadhaul is 50c a hundred pounds and, therefore, establishes a rate of $1.00 to include the two terminal services and the roadhaul, if I were apportioning that dollar of revenue between the company owning the line and the two companies owning the terminals, I presume that I would necessarily apportion 25c to each of the terminal companies and 50c to the roadhaul, and in that case I would think that the revenue would have to be apportioned in proportion to the cost of service.

If we have a repair shop outside of North Dakota used for repairing cars and engines moving through North Dakota, then on the cost of service method, the apportionment of these costs would be given over and assigned to North Dakota in apportioning the revenue. If they were billed against North Dakota operation in proportion to the extent that they were used for North Dakota operations then to that extent I would agree that an apportionment of the revenue in proportion to the cost of service would be fair. You are trying to determine where the revenue is earned on the basis of cost of service, and if the expense was incurred on account of the cost of service in North Dakota under your theory it should be apportioned to North Dakota regardless of where the shop might be located.

If you have a through shipment that pays $1.00 for the entire haul and if 10c of the cost is incurred for car and
259 locomotive repairs in a shop outside of North Dakota, I would think that if that 10c is billed against North Dakota and included in North Dakota costs, a corresponding portion of the revenue should be credited to North Dakota, but if the 10c were charged to the state where the shop is, I would not agree that the corresponding part of the revenue should be allocated to that state.

If the ownership of the entire Great Northern railroad were divided according to state lines so that the lines in each state were owned by an independent corporation connecting with each other and exchanging through business in about the same manner that it is exchanged now, then in view of the fact that the large terminal and large shops and tunnels are all outside of North Dakota and that there is more embankments, more bridges and heavier steel in the corporations outside of North Dakota, and that the average mile of

plant owned by these other corporations contains twice as much physical property as the average mile of plant in North Dakota and also involves a higher operating expense, I presume an agreement between the roads would involve some consideration of apportioning the total revenue so as to give the outside corporations enough revenue to meet all of their expenses and investment on their plant as well as doing the same for North Dakota. As a matter of practical business, this would surely be done. As to whether this would involve a division of revenue in proportion to the cost of service, I believe that other things enter into that. I never made an assignment of that kind but cost of service would certainly be considered.

As to the apportionment of the through rate as illustrated in Mr. Turnburke's Exhibit 11, as far as the allowance to use of property is concerned, it probably should be
260 given consideration. I cannot see why the difficulties of operation should be capitalized and the lines should be given great credit because of high expenses. I do not say that it is wrong to give each state enough revenue to pay its operating expenses. But the cost of operation in any particular state is impossible to accurately ascertain and always has been so considered. However, if the operating expenses could be accurately determined, I presume that an apportionment of the revenue on an individual shipment on the method shown in Exhibit 11 would be fair but not an apportionment of value. I presume that such an apportionment in proportion to cost of service is more fair than a track mileage proportion as to revenue. As to whether it would make any difference whether the rate were 4% or 1% or 10% on the investment, I do not see very clearly just what difference the difference in the rate would make. I presume that the method is just as fair in the case of an individual shipment whether it is a rate that pays a low or high rate. I am not prepared to say whether the method illustrated in Exhibit 11, if applied to every individual through shipment on the line would produce a correct apportionment of interstate revenue. I have never studied railroad accounting. The reasons that I have in mind to the contrary are that through rates are purely competitive and that the short haul or the easy haul, the line that has the shortest haul and the easiest haul and the cheapest haul fixes the rate that governs all other roads and you are capitalizing the difficulties of operation.

Assuming that the entire body of interstate traffic on the railroad is paid by some rates which produce a high return

and by some that are made very low for competitive
261 and other reasons and some that are intermediate paying different rates of return, I cannot see any unfairness or impropriety in applying Mr. Turnburke's method as illustrated in Exhibit 11 to each individual movement, apportioning the revenue on each individual movement as between states in such a way as to give each state enough to pay its operating expenses, and then adding up the total of the individual assignments in each state in order to determine the state's proportion of the system interstate revenue. You would then assign to Minnesota and Wisconsin the iron ore traffic that is in those states and none of the revenue from that traffic would be assigned to any other state. Likewise, the wheat movement out of North Dakota and the interstate movement into North Dakota from eastern points should be assigned to the states where the operations actually took place. I cannot see any unfairness about that.

One of my main criticisms of Mr. Turnburke's method in Exhibit 12 is that instead of allocating each movement separately he lumps them all in one jackpot. I have considered how much the results might vary between Mr. Turnburke's method in Exhibit 12 and the method of allocating each individual shipment separately, but I did not have any information upon which to determine the difference. No such information is available and no records are kept in such a way as to determine that matter and no such information is reported to any state taxing body or railroad commission.

As to Mr. Turnburke's testimony that it is possible to determine accurately the operating expenses incurred by a through railroad in any state, I know very little about that phase of the railroad business, and I would not be able to point out any particular item that cannot be correctly
262 determined for a state. It would seem to me, however, that property in one state is often used to furnish service to property in another state and just how those expenses are allocated I don't know.

I would agree that a locomotive mile moving 200 tons on a North Dakota branch should not be given as much credit as a locomotive mile moving 10,000 tons or producing 50 times as much service on an ore line, as an allocation factor. I would also agree that a car mile moving 16 tons in North Dakota should not be given as much credit as a car mile moving 75 tons of ore in Minnesota. As to whether car and locomotive miles alone would be unduly favorable to North Dakota, the item of revenue would enter in there, the revenue derived

from the commodity. I do not know as to tonnage, but I am under the impression that it is not true that a locomotive in North Dakota hauls less cars than on the rest of the system.

As to whether the car mile factor alone would be unduly favorable to North Dakota with a 16 ton load in North Dakota compared with 30 tons on the rest of the system, it does not work out that way as to the whole, I do not believe. This would be largely on account of the iron ore business which does not touch North Dakota.

In Exhibit J, I compared North Dakota with the entire system and ton miles handled per mile of all track. The reason for the use in that manner is that miles of road is seldom, if ever, used as an apportionment factor, but all track mileage is a commonly used apportionment factor. I I believe it is correct that ton miles per mile of road is universally used as a measure of traffic density and that ton miles per mile of all track are never so used. In the 1932 I. C. C. statistics of railways, traffic density is entered up on an all-track mileage basis as well as miles of road. That is a new departure. If you had 100 miles of road in
263 North Dakota with 10 miles of side track and terminals and 100 miles in Minnesota with 50 miles of terminal track and the same tons moving over each, I do not know whether it would be fair to measure traffic density by dividing the number of tons by 110 in North Dakota and by 150 in Minnesota. If you are going to divide by miles of all track including terminal tracks and should divide that into a ton mile figure including the ton miles made on the terminal tracks and switching service, ton miles on switching service at the originating point should be taken into consideration as well as ton miles at terminal points. I offered Exhibit J to prove that North Dakota has a traffic that is not very much less dense than the traffic on the system. If I had used ton miles per mile of road, I would have shown that in fact North Dakota miles are much less dense than the miles on the system.

As to whether a similar criticism is applicable to Exhibit K and Exhibit L, I would not say it was a criticism. An allocation of value on a mile of road basis would obviously be unfair because a mile of road in North Dakota is not comparable to the average mile of road on the entire system and that method of apportionment of values has been universally condemned but the all track mileage method of apportionment is in very general use and I have merely tried to test whether the all track mileage was unfair by these exhibits. I would show that if you made a comparison on a mile of road basis,

naturally the traffic density in North Dakota is less than on the entire system, but a mile of road in North Dakota contains less traffic than the average mile of road on the entire system. The all track mileage factor is considered the better factor. It is substantially correct to say that Exhibit K is offered for the purpose of showing that the density per mile of all track is almost as great in North Dakota
264 as on the system and that, therefore, the all track mileage ratio is a proper ratio to use in allocation. The all track mileage ratio has been condensed in some cases where it obviously was unfair and these exhibits are presented to show that it was not unfair.

Referring to Exhibit L which purports to show that North Dakota tracks earned $3000 a mile while the system earned $2816 per mile, in obtaining those figures I have not deducted taxes either in North Dakota or on the system. In determining my revenue per mile of track in North Dakota, I used the figures reported to the State Railroad Commission or the State Tax Commission. If a mileage prorate allocates too much revenue to North Dakota my average earnings of $3000 a mile would be too high. In the reports reporting gross revenue, the interstate revenues are allocated to North Dakota on the basis of the miles of road over which the shipment is hauled and I have taken revenues allocated to North Dakota on that basis of miles of road and then divided them by miles of all track instead of miles of road to get my earnings per mile. That combination is not unduly advantageous to North Dakota for the purposes for which the table was presented, to test the validity of the all track mileage basis of proportion. Both of the last several exhibits you have mentioned have been merely for that purpose.

On Exhibit I, I show that the composite ratio of non-operating to total assets is 30.29%. In round figures the system value of $345,000,000 as shown on Exhibit P for the 1933 assessment is 70% of the total corporate value. This would give a 100% corporate value of about $493,000,-000.

265 In order to get the assessment for North Dakota in 1933, I have to increase the computed value as shown in Schedule 4 of Exhibit B by nearly 25%. If I increased the total corporate value of $493,000,000 by 25%, I would get about $597,000,000 or practically $600,000,000 in round figures. The par value of all the outstanding bonds of the system was $350,000,000 in round figures so that if the total corporate value determined in proportion to the North Dakota assessment were $600,000,000 and the company discharged all of

its bonds by paying them at par, it would apparently leave a value of $250,000,000 or $100 a share for the stock or over seven times the average market value in 1932.

In Exhibit O, I show the 1933 assessment as being 19% under 1917 and 9% under 1919, but the earnings value of the property had decreased at least 33-1/3% from 1917 and 1919 to 1933 and the assessment only 19%. The income in 1919 was almost 50% above the income in 1933 and in any event, the decrease in value as shown by decreased earnings was much greater than the decrease in assessment.

I recall that in 1919, the market value of the stock was about $100, which would produce a stock and bond value in 1919 of somewhere near $600,000,000 and in round figures. The stock and bond value of the company in 1933 had also decreased by a bigger percentage than the assessment.

Even if it were possible to determine net income in a state accurately, I would not agree that it would be the very best measure of the value of the property in the state and also the best measure of apportioning system value in a state. I think if a railroad line in a given state produced no net income which could be directly attributed to that state, none whatever, it is still an integral part of the system which is necessary for the conduct of the entire railway system and it has a value even though there is no net produced in the state.

266 Redirect Examination.

By Mr. Shaft:

Referring to Exhibit I and to the non-recurring income from non-operating property which I referred to, the principal item of non-recurring income is a special dividend received from the Burlington Railroad in 1930 amounting to $4,150,895. There undoubtedly are other items of non-recurring income but I have not got specific information on that and this is the largest single item. That, however, was not the principal reason for using a seven year period in the case of the Great Northern. In order to explain that I will have to go back to the fact that many years ago, I think it was back in 1902, the Great Northern and Northern Pacific Railway Company bought approximately 97% of the Burlington stock. They issued collateral trust bonds amounting to $230,000,000. The purpose of those collateral trust bonds was to purchase the Burlington stock. When those bonds became due, I think in 1921, it was necessary to refund the original bond issue and the historical record shows the Great Northern Series "A" General Mortgage Gold Bonds were

issued to refinance the original collateral trust bond issue as to the Great Northern proportion. The statement has been made that those bonds are secured not only on the Burlington stock but on the Great Northern Railway itself, and that is true, but the reason for that was that the Burlington stock in itself was not sufficient security for the issuance of the $115,000,000 bond issue, the security of the Burlington stock was insufficient to float those bonds on the market, consequently they made a general mortgage on a large amount of Great Northern property. What I am leading up to is this, that that asset of Burlington stock which for a long period of years was considered very, very valuable, has now turned into a liability and in 1932 and also in 1933 it was necessary
for the Great Northern Railway Company to dig down
267 in its own pocket and pay out $4,919,593 in addition
to the dividend that they received, the small dividend that they received from the Burlington in order to pay interest on this bond issue. The result of having to dig into its surplus and other resources in order to retain this asset has been to depreciate the securities of the Great Northern that were junior to this bond issue, particularly the common stock, and going back to the item of non-recurring income, when you apportion values on the basis of relative income, it amounts to almost the same thing as capitalization and when you give the same weight to a non-recurring item of income as to regular annual income, why you are going to get an incorrect result and for these two reasons I thought it much fairer to use a seven-year period in finding a ratio of relative income from non-operating property to the total income of the corporation. I might add in addition to that that using a five-year ratio in place of the seven-year ratio and eliminating non-recurring items of income, which in this case is more than off-set by what the Great Northern dug up out of its own pocket in 1932, we obtain a ratio that is approximately the same as the ratio I have in the exhibit for the seven-year period. The ratio thus obtained is 35% instead of 34.36% and the composite ratio of a composite of the property and the relative income ratio becomes 30.60% instead of 30.29%, a difference of less than a third of one per cent.

I call that special dividend an item of non-recurring income because of the fact that for quite a period of years the Burlington had paid a regular dividend of I believe 10% and this was a special dividend of 5% in addition. The dividend from the Burlington over a long period of years was 10%. That was made in 1930. I would not, however, eliminate that non-recurring item of income if it was not more

than off-set by the fact that the Great Northern had
268 to dig down into its own pocket in order to carry this asset.

Referring to my testimony that I had tried one other method of valuation known as the Haugen method, that method produces a much more favorable result to the state as to the year 1933 and also for each of the preceding years. I did not introduce it in evidence here because I confined my exhibits to the generally known and accepted methods of valuation and while the Haugen method has had some use it has not been given general recognition. In connection with its use in 1933 it showed an over-assessment in North Dakota of the Great Northern property of about 8%.

In presenting these exhibits and tables, it has not been my intention to state that any of these formulae produced a true valuation of the Great Northern Railway. My purpose has been to show that by the use of most any formula that has been given any recognition the assessment in the four years immediately preceding 1933 could be justified and then I have shown what results were produced for the year 1933 by each method.

As to my statement that the excess in the 1933 assessment over the results produced by any of these tables operated to some extent to condemn the 1933 assessment, I will say that the very best statistical evidence of value are not definite proof of value and there were a number of peculiar and extraordinary circumstances for the Board to consider in 1933 that are not in any way indicated by statistical exhibits. I do not feel that variance from the results produced by my table present an absolute showing of a wrongful assessment on the part of the State Board.

When I say that the State Board of Equalization had unusual facts and circumstances before it in 1933, I refer
269 to two different things, first, the general economic situation, not only in the United States, but particularly in the State of North Dakota, with an almost total collapse in the value of all property and with almost a total collapse in the income producing ability of property not only in North Dakota but generally; and the second matter to which I refer was the fact that in 1932 the people of North Dakota by an initiated law changed the tax base from 75% of full value to 50% of full value. Due to the various tax limitation laws limiting the tax levies of all classes of taxing districts this handicapped the various equalization boards and particularly the State Board of Equalization in

reducing property values down to correspond to some extent to the drop in income and corresponding to the actual loss in value which had occurred. The tax base had been more than cut in two in a few years. In 1923 the tax base on a 75% valuation was approximately a billion and eighty-nine million. This had gradually shrunk and then was decreased by one-third in 1932 by reason of the initiated law, and the various taxing districts, counties and school districts, to a very large extent, were unable to levy sufficient revenue under the new tax base to meet ordinary running expenses.

Referring to my statement that in computing the stock and bond values of the railroad, the state of the market during the portion of the year 1933 preceding the meeting of the Board of Equalization had not been taken into consideration, I will say that the three months preceding the date of the assessment or four months, showed a tremendous upward trend in the stock and bond market and we were in the middle of a boom during the months of May, June and July. When I speak of the stock and bond market, I include all stocks and bonds. There was a very sharp rise in Great Northern stock. I don't recall the extent of that rise.

270 Recross Examination.

By Mr. Dorety:

I meant a sharp rise over what the price had been just previous to that time. July, 1932, was the low point in the stock market in a great many years, the average of all stocks and bonds listed on the New York Stock Exchange fell to an all time low level for a good many years in the month of July. I know that there was a collapse right at the time of the bank holiday. The 1932 average on Great Northern stock was about $13.00. And if I recall it, the Great Northern stock went much higher than that during that rise. I have not the exact figures on the total Great Northern stocks and bonds with me.

Redirect Examination.

By Mr. Shaft:

I have looked over the brief which was filed by the Great Northern Railway with the State Tax Commissioner in connection with their 1933 taxes. The factors of allocation used by them were all track mileage, car and locomotive mileage, ton and passenger mileage and gross operating revenues, the four, the same four as are given in schedule 2 of Exhibit P. By the application of those four factors to the system

value which I have ascertained, a percentage of 18.05 of system value was obtained.

(At this point the defendant concluded its direct testimony and rested its case.)

V. P. TURNBURKE, a witness on behalf of plaintiff, was recalled in rebuttal and testified as follows:

Direct Examination.

By Mr. Dorety:

I have prepared a statement comparing the North Dakota assessment of Great Northern operating property each year from 1928 to 1932, inclusive, with the actual value as
271 computed by the method shown in my exhibit 12. This statement is marked Plaintiff's Exhibit 21. The figures on it are correct and correctly show what they purport to show. The figures in column 1 are the system value as determined in Defendant's Exhibit P, column 3, and those in column 2 are the rate of allocation to North Dakota as shown on Plaintiff's Exhibit 12 for each of the five years shown. Column 3 is the product of columns 1 and 2, representing the amount of the system value assignable to North Dakota on the basis shown in Plaintiff's Exhibit 12, and the actual assessment shown in column 4 for the State of North Dakota is from Defendant's Exhibit P, column 8. The fifth column is a computation of the percentage of over-assessment in North Dakota, using the system value as determined by the defendant in Exhibit P and the North Dakota apportionment on the basis of Plaintiff's Exhibit 12.

As to how values for the Great Northern operating property in North Dakota, if computed by a similar method each year for the years prior to 1928, would compare with the assessed values in the same years, the factors used by the State necessarily produce a very much higher value for North Dakota in any year than the method used in Exhibit 12 and an application of the method in Exhibit 12 would necessarily show over-assessments of approximately 50%, if not more, in every year. The result of the State's method of allocation is to levy a tax in North Dakota upon the terminals and other values outside the state, and this would be true in any past year in which the State's method had been used.

I am familiar in a general way with the railroads of the other railroad companies competing with the Great Northern for the movement of traffic between the Middle West and the

North Pacific Coast. I think it is true as a general statement that the situation on those lines is approximately
272 the same as on the Great Northern with respect to location of principal terminals and shops and expensive mountain construction and that their operating expenses and capital costs are correspondingly high in states where those of the Great Northern are high and correspondingly low in states where the Great Northern's are low.

I have prepared Plaintiff's Exhibit 22 computing system values for the Great Northern Railway property on various bases. This is a correct statement. Exhibit 22 shows a computation of system value on several different bases, the average for the three years 1930 to 1932, the four years 1929 to 1932, and the five years 1928 to 1932. The first set of figures, item 1, show a capitalization of the net railway operating income for each of the three years mentioned, item 1-a being at the rate of 7%, and shows a system value of $170,000,000 for the average for the three years and $244,000,000 for the average for the four years and $284,000,000 for the average for the five years. If the capitalization were made at 6%, that is the capitalization of the net railway operating income indicated, system value would be $199,000,000 the average for the three years, $284,000,000 the average for the four years and $332,000,000 the average for the five years.

Item 2 is a stock and bond value for the average for the three years, the average for the four years and the average for the five years, after deducting an allowance for the non-operating property, which is included, out of the stock and bond value. Item 2-a is a deduction on the basis of a five years income, 36.71% and I have used that factor for each of the three items, that is, I have not used three years income for the three years and four years income for the four years, but I have used the five years income or 36.71% for each of
the three years, deducted the 36.71% from the average
273 stock and bond value for the three periods. Item 2-b I have made a deduction on the basis of the composite income and asset ratio developed by the defendant in Exhibit I, 30.29%, which because of this smaller percentage makes for a somewhat higher system value, as the figures indicate. Item 3 on Exhibit 22 is a capitalization of the prospective future normal net railway operating income of $14,000,000 based on Mr. Beidelman's testimony as to the normal, expected future gross of $86,000,000 and my testimony that that $86,000,000 gross would be translated into $14,000,000

of net railway operating income. Item 3-a is a capitalization of the $14,000,000 at 7% and item 3-b at 6%, system value of item 3-a being $200,000,000 and for item 3-b $233,000,000. I have also placed on this exhibit simply for information, the assignment to North Dakota based on the net income before taxes as developed in Plaintiff's Exhibit 12 for the five years 12.22%, and the basis of the five factor per cents Defendant's Exhibit P, Block 4, which I understand is the basis used by the defendant in making its answer in this case, the figure of 18.34%.

This exhibit is not offered with the idea of advocating any particular one of the bases which it shows. It is simply to spread before the court these various bases for the court's own information and benefit. With the aid of this exhibit, it is possible for the court or anyone else, after determining how long a period should be used for earnings and what rate should be used, to determine by ready reference what the system value would be on that basis, and after determining how many years stock and bond figures should be used and what basis of apportionment should be used in determining the value of the railroad.

(The documents marked "Plaintiff's Exhibit 21" and "Plaintiff's Exhibit 22" were offered and received in evidence and are included herewith as Plaintiff's Exhibit 21 and Plaintiff's Exhibit 22.)

274 In referring to Defendant's Exhibit C I want to point out that the amount shown as the dividends declared under the fourth column, dividends declared per share, while technically correct does not represent the dividends paid. Referring particularly to the figures for the year 1930 that shows 7½% as the dividends declared. That $7.50 is the sum of three different declarations of dividends, three semi-annual declarations of dividends, and at no time for the last forty-five years has the Great Northern paid over $7.00, and at no time in the last ten years has it paid over $5.00. The facts are that on the basis of the dividends paid in 1930 there was $5.00 paid the same as in previous years; that in 1931 $4.00 were paid and in 1932 $1.00 was paid. In other words, there was no increase in the dividends paid in the face of this sharp falling off of earnings that was occurring at that time, which is clearly indicated in the third column of Exhibit 6.

Exhibit F shows a ratio of investment in operating and non-operating property, which I think is entirely immaterial for the purpose of apportioning stock and bond values. A property may represent a very large investment on the books

of the company and yet be worthless at the present time either for sales purposes or for income. On the other hand, the property may have some little book value and still be a valuable asset as an income producer. It seems to me that the income actually received from the non-operating property is the best criterion of their value, regardless of the amounts that they are carried on the books of the company. In fact, if anything, I would think that the value of the non-operating property might be somewhat in excess of what its income produces, due to the valuable assets represented by that property, which is not at the present time producing any income.

275 Exhibit H shows a ratio of non-operating income to the total income on the basis of a seven year period. There has been considerable testimony as to why the seven year period was used instead of a five year period, to the effect that an extra dividend by the Burlington, which occurred during the five year period, was non-recurring, and, therefore, the period should be lengthened to seven years. However, I want to point out to the court that during the five year period the Burlington Railway actually paid out in dividends considerably less than it earned during that period, even including the extra dividend; so that it could have adopted a higher basis of dividend disbursements than it actually did adopt, and I take it that if the dividend, instead of having been a $5.00 extra in one year, had been $11.00 for each of the five years instead of $10.00, that there would be no objection to it on the ground of a non-recurring item. In any event, the fact remains that this is the only place where there has been any departure from a five year average where a period has been used at all in excess of one year, and that by making such departure it increases the assignment of value to North Dakota on the State's basis.

I do not know of a single case where the dividends received by the Great Northern Railway Company from its subsidiaries during these five years were in excess of those earned and I know of no extra dividends that were received except the $5.00 extra that had been pointed out by Mr. Baker.

If Mr. Baker had used the five-year period instead of the seven-year period, I would agree with him that it would have increased the apportionment of value to non-operating property up to 36.71%.

276 Exhibit I develops a composite ratio for non-operating property, using the income basis for seven years and the ratio of assets for the preceding year added together and divided up to obtain the composite ratio.

The composite ratio for 1933 is only slightly over 30%, whereas the five-year income ratio for that year would be 36.71% or nearly 6½ points higher. If instead of 30.29%, the ratio of the non-operating income to the total income for the five year period were used it would produce a system value for the railroad of nearly $32,000,000 lower than was produced by the defendant, and this when applied to North Dakota would result in an excess of about $6,000,000, the assessment over the valuation.

Exhibit J is headed "A comparison of freight traffic density per mile of all tracks operated". I have seen the freight traffic density used in many a case in the past twenty years of my experience but I have never seen it worked out on the basis of the miles of all tracks operated before I saw this exhibit. The Interstate Commerce Commission in its annual reports prescribes at schedule 508 the averages per mile of road for various items, including the ton miles of revenue freight per mile of road, which is item 125 on page 509 of the annual report of the Interstate Commerce Commission. That is the factor commonly known as the traffic density. The reason why it is improper to divide the ton miles of revenue freight by the total miles of track is that the dividend, that is the ton miles of revenue freight, does not include the ton miles made on all tracks but only the ton miles made upon the miles of road track, but the divisor, the miles of all tracks operated used in Exhibit J, includes the mileage of tracks over which in fact the tonnage is moved producing ton miles, but the ton miles so produced are not included in the dividend, so we have the use of a dividend that is a partial reflection of the total ton miles and the use of a divisor that is a complete reflection of all miles of track.

277 If I were to compare the ore lines in Minnesota and Wisconsin as to density by using ton miles per mile of all track, I would probably show 2/3 as much density in Wisconsin as in Minnesota, simply because the Wisconsin mileage includes a large terminal mileage at the docks, notwithstanding the fact that the density of that particular traffic is necessarily the same as it is for a through train movement. Another thing about Exhibit J is that the comparison is made between the State of North Dakota and the system and not between the State of North Dakota and the balance of the system, thereby having the figures for the system dragged down by the lower traffic density in the State of North Dakota.

If Exhibit J were corrected by showing ton miles per mile of road and by comparing North Dakota with the balance of

the system, it would show that the density in North Dakota is no more than 2/3 as great as that for the balance of the system.

The same criticisms which I have just made would apply to Exhibit K. The various columns in Exhibit K, the operating revenues, traffic units, car and locomotive miles, are all based on considering only the miles of road and not the miles of track or the operations connected therewith. Furthermore the comparison is between the system and North Dakota and not North Dakota with the balance of the system.

Here again a correct computation would show a very much lower density for North Dakota.

Exhibit L purports to show that the ratio of operating expenses to revenue is lower in North Dakota than for the system and that the net revenue per mile of track is greater in North Dakota than on the system. This result is brought about directly by the use of the mileage prorate in dividing interstate revenues on a mileage basis. If this same method was used in the State of Washington and Wisconsin it would show that those states had no net revenue per mile but instead had a deficit and that their operating expenses exceeded their revenue, and because this mileage prorate of interstate revenue takes revenues which belong in Wisconsin and Washington in order to meet their terminal expenses and other higher costs and allocates them to North Dakota we have the result as shown on Exhibit L. If a proper allocation of the interstate revenues were made it would show a much smaller net revenue per mile in North Dakota than on the balance of the system.

278

Referring to Mr. Baker's testimony in connection with Exhibit M that tons originated per mile is not a proper factor for allocation of system value and should never be used, I agree with Mr. Baker in that respect and we have not attempted to use any such average as an indication of value or as an allocation factor.

As to my purpose in offering Exhibit 13 which compares ton miles per mile originated in North Dakota and on the balance of the system, I will say that if I understand the testimony of defendants in this case correctly, the contention has been made that the branch lines in North Dakota are entitled to some special credit because of the freight that they originate and deliver to the main line for transportation over the lines of the system and my Exhibit 13 was prepared solely for the purpose of showing that North Dakota tracks originate

less tons per mile than the balance of the system. I do not believe that the tonnage originated throws any light upon the value of the tracks or that it should be used as a factor in allocation or that any track should be given a special credit for originating tons, and I introduced Exhibit 13 merely to show that if any special credit is to be given to the tracks for originating tonnage, the balance of the system is entitled to more credit on this account than the tracks in North Dakota.

279 Referring to Mr. Baker's criticism of my including Washington import tonnage on Exhibit 13 as originating in Seattle but which really originated in China and Japan, if on the one hand North Dakota is to receive special consideration for originating the traffic that it originates, I see no reason why Washington should not be given credit for the tonnage it originates, whether it originates in the City of Seattle or at the docks in Seattle, or for that matter whether it is received from a connecting line in the State of Washington where we do receive vast quantities of freight. Every ton of freight so originated or received contributes materially to the system earnings and to my mind if there is anything in this argument about the origination of traffic, then I see no reason why the export and import traffic or the import traffic should be eliminated. If as I now understand Mr. Baker's testimony, he says that the traffic originated is immaterial, why I say as I did before that I thoroughly agree with him and there is no further point to these exhibits.

Referring to Mr. Baker's suggestion that if a comparison of this sort is to be made at all, the Washington import tonnage and also the ore tonnage should be disregarded, my recollection is that he said if you throw out the whole state of Washington and throw out the whole State of Minnesota then North Dakota would show a higher figure. So far as the ore traffic is concerned, it undoubtedly is traffic that moves at a lower revenue per ton, if that is to be the measure rather than the average ton on the system. On the other hand, the import traffic moves at a higher revenue per ton, and if there is any weight to be given to the revenue produced by the tons, then the ore tons would have to be decreased but the import tons increased. In any event, if these adjustments, all of them, were made, North Dakota would still originate
280 much less traffic per mile measured by value than the balance of the system.

Referring to Exhibit N on which Mr. Baker develops the various allocation factors, I pointed out on my direct testimony that the track mileage factor, which is item 4 on Exhibit N, gives no credit to the other states for the expensive

terminals, shops and mountain construction and ignores the fact that the average mile of road outside of North Dakota has twice as much physical property and twice as much railroad plant in it as a mile in North Dakota as testified to by Mr. Bowen. The car and locomotive miles, item 1, on Exhibit N, treat a car mile or a locomotive mile over a cheap track in North Dakota as though they performed as valuable a service as a mile of movement over a track of double that value in other states. In addition to this they treat a locomotive mile on a branch line in North Dakota, handling possibly 200 tons in the train, the same as a locomotive mile handling fifty times as much tonnage on the Minnesota ore lines. They give the same weight to a car mile in North Dakota handling sixteen tons per loaded car as is given to the cars on the balance of the system averaging twenty-five to twenty-eight tons per car. They treat a ton mile or a passenger mile in item 2, in North Dakota as equal to one requiring twice as much plant on the balance of the system. They also fail to credit to other states the ton miles, car miles and locomotive miles made over the terminal tracks located within those states, although those tracks are more costly and more valuable on the average. The total operating revenue factor, item 3, is also too large for North Dakota, because it includes a mileage prorate of the interstate revenue. The physical factor, the last one, ICC cost of reproduction new is a fair measure of the amount of the railroad plant in North Dakota compared with the rest of the system, but when
281 you make up the five factor allocation and four of the factors are based on these other traffic movement averages, which run from six to twenty per cent in North Dakota, then the inclusion of the 14% physical property with the weight of one-fifth has very little effect on the composite average, the other four factors smothering it off as it were, and raising the factor applicable to North Dakota.

You will note on Exhibit N the last block of ratios cover the physical property and is headed "I. C. C. Cost of Reproduction, less depreciation" and so forth. For the years 1929 to 1932, the figures used are the cost of reproduction less depreciation, but for the year 1933 the ICC value new was raised instead of the ICC value less depreciation and that increases the percentage assigned to North Dakota by nearly one-half of one per cent. The year 1933, which is the assessment year again and refers to the calendar year operations of 1932, is the only year in which the higher figure is used, thereby decreasing the apparent over assessment in the State of North Dakota for that year.

Exhibit P includes full allowance for all of the inaccuracies that I have been discussing in these previous exhibits. In

column 1 it uses a stock and bond value for the five year average, which gives as much weight to prices five years ago as to current prices. If a three year period were used instead of a five year period, by reference to Exhibit 22 it will be found that the reduction in the stock and bond value would approximate $46,000,000, that is the system value as so measured, and referring to that portion that relates to the operating property. The second column on Exhibit P shows capitalization of earnings, also using a five year figure, which includes $63,000,000 of boom year earnings for two years four and five years ago, and about $36,000,000 during the last three years covering the present economic period. If even
282 one of these boom years were excluded and an average for four years used instead of a five year average, it would reduce the system value when capitalized net at 6% by $47,400,000. I believe that a 7% rate is as low a rate as can possibly be justified at the present time and in 1932, and referring again to Exhibit 22, it can be shown that if 7% were used it would decrease the system value based on the net railway operating income capitalized at 7% by another $40,700,000. If all three of these changes were made and net effect on the average of the stock and bond value and the capitalized value would be a total decrease of $68,000,000, the figures shown in the third column of Exhibit P. This reduction in system value of $68,000,000 would decrease the North Dakota value by $12,700,000 using the allocation basis advocated by the defendant in block 4, Exhibit P, on the so-called five factor basis, and that would show an over-assessment of $28,100,000 or about 55%. However, I believe that this factor of allocation is far too high for reasons that I have previously stated, and if the allocation were made according to the computations in my Exhibit 12 it would cut off another $17,000,000 in North Dakota value, or if my allocation were averaged with Mr. Baker's, the total reduction in the amount assigned to North Dakota would be $21,200,000 and the over-assessment would be $36,700,000, always referring to the year 1932, which is an 87% over-assessment instead of the 24.52% shown on Exhibit P, block 4.

When I say "always referring to the year 1932" I mean the 1933 assessment year or the 1932 operating year. That is, my testimony is not going to the other years as shown on this exhibit. As it stands now Exhibit P, Block 4, shows an over-assessment in 1932 of 24.52%, and if any one of the corrections that I have indicated were made it would greatly increase this over assessment.

283 Exhibits R, S and T are on the so-called Balch method, but the system value items a, b and c are the

same as those developed on the other exhibits by the defendant and subject to the same criticism. This estimate gives the same weight to stock and bond prices of five years ago that it gives to the prices today and apportions them between railway operating and non-operating property partly in proportion to the investment, which I think is erroneous for reasons which I have stated. It capitalizes the five years earnings, nearly two-thirds of which were earned in the boom years of four and five years ago and uses only a six per cent rate for capitalization when the going rate was much higher. One of my exhibits shows that at this very time the yield to maturity on Great Northern bonds was nearly eleven per cent. Of course, the yield on stock demanded by investors would be still higher. The method of allocating system value to the states by the so-called Balch method differs but slightly from some of the methods used in Exhibit P and is subject to the same criticisms which I have mentioned in connection with that exhibit. It apportions the operating revenues, ton miles and passenger miles, car and locomotive miles on the miles of track operated basis when the basic information is based on the miles of road operated. In spite of these objections Exhibit T shows that for the year 1933 by the Balch method the ratio of the assessment to the assigned value was an overassessment of 19.31%.

The criticisms of the method of using traffic units and operating units per mile of all track instead of per mile of road, which I made in connection with Exhibits J, K and L, would likewise apply to Exhibits R, S and T. The same basis is used but in a slightly different form.

284 Mr. Dorety: May I ask whether the court has reached a conclusion about admitting the farm income exhibits U to Z-1?

The Court: I think the best thing for this court to do is to overrule the objection and leave the exhibits there for what they are worth. They might mean something different to some other court than they do to me and if that situation requires some counter showing by the plaintiff in the case I will probably permit it; so the objection at this time will be overruled.

Mr. Dorety: And will the court allow me an exception?

The Court: Yes, I will allow you an exception, certainly.

(Whereupon the witness continued to testify as follows):

In connection with these exhibits U to Z and Z-1, it was stated that the use of the gross income and cash income was

not used as an indication of value but to measure the changes in value. I have no knowledge as to the farm income but I do know that the changes in gross revenue of the railroads do not reflect even an approximate measure of the changes in value. The gross revenues of the Great Northern Railway Company in 1929 were nearly $126,000,000, and it dropped in 1932 to something over $55,500,000. The year 1932 was approximately 44% of the 1929 figure as measured by the gross revenues, but during the same period the net railway operating income, which is the revenues less expenses, taxes and some small items but not excluding bond interest, and is the amount available for paying bond interest and dividends, the net railway operating income declined from $32,000,000 to approximately $1,000,000, the decline, the 1932 figure being 4% of the 1929 net, whereas it was 44% of the gross. In other words, the decline in net was eleven times as much as the decline in gross. The value of a railroad property is determined entirely by its net earnings and not at all by its gross revenue, and the changes in value should be measured by the changes in net and not by changes in gross. I
285 assume that the same thing is true as to farm property but these exhibits throw no light upon the farm net income and, therefore, afford no basis of comparison between farm property and railroad property even as to change in value. If Mr. Baker is correct in stating that the changes in the value of farm property are measured by the gross income and if I am correct, as I believe that I am, in stating that the changes in value of railroad property are measured by the changes in its net, then it would be more logical to compare the gross farm income with the net railway operating income, just for the purpose of reflecting changes in value.

I have prepared such a comparison as that and the statement is marked Plaintiff's Exhibit 23. The figures on that are correct and correctly show what they purport to show. The figures I had available for the railway operations covered only the last five years, so that I have taken the upper part of Plaintiff's Exhibit 23 from Defendant's Exhibit U for the years 1928 to 1932, inclusive. Defendant in Exhibit U or corresponding to the lower portion of Exhibit 23, used the total operating revenues for the Great Northern, whereas I have used in the first column on the lower half of this sheet the net operating revenues after taxes in the State of North Dakota. Now these net operating revenues shown here are the gross operating revenues, assigning the interstate revenue on a mileage prorate less operating expenses and taxes, not that the revenues so assigned are accurate but merely for illustration purposes. If a correct ascertainment of the

net operating revenues were shown the figures for 1932 for the State of North Dakota would show a deficit after taxes. In any event, the last column in the lower half of the sheet shows the ratio of assignment of the net revenues of the Great Northern in the State of North Dakota and that it increased from 899% in the year 1928 to 13556% in the
286 year 1932, whereas the figures based on the gross income from farm production and the cash income from farm production compared with assessment of farm real and personal property in the upper part of Exhibit 23, taken from Defendants' Exhibit U, shows an increase from around 370% to 400% in 1928 to 1000% or 1200% in 1932. In the case of the farm property, the 1932 per cent shown in the last column was about four times the 1928 per cent and in the case of the railroad property the 1932 per cent shown in the last column is something like fifteen times 1928 and is so shown in items 1, 2 and 3 at the foot of Exhibit 23.

(The document marked "Plaintiff's Exhibit 23" was offered and received in evidence and is included herewith as Plaintiff's Exhibit 23).

Reference by counsel for the State to the method of allocation shown in Exhibit 12, as being a method of allocating system value to states in proportion to cost of service, is not a correct description of my method. There has been a rather confusing use of terms to apply to my Exhibit 12 and the facts are that Exhibit 12, sheet 2, is an assignment of the interstate revenue to states on the basis of the cost of service. It has nothing whatever to do with the value of the property in the states as such and it is not so used. Having assigned the system interstate revenue to states it is a simple matter then to obtain the net applicable to the state by subtracting the operating expenses and other deductions from the total revenues, including the intrastate and a proportion of the interstate to get the net assignable to the state, and the proportion of net of the system earned in North Dakota is then used as the factor representing the proper allocation of system value to North Dakota. It is not an attempt to allocate value to North Dakota or any other state on a basis of cost of service and it is not contended that the state that has the higher cost, therefore, has the higher value.

287 Referring to Mr. Baker's statement that my method of allocation of interstate revenue as shown in Exhibit 12 assumes the idealistic in which all rates are based on cost of service plus a fair return and that it also assumes that the rate of return is uniform in every case, that is not a fair statement in regard to my method.

If you will refer to Exhibit 11 I think I will show that that is not so. In Exhibit 11 I have illustrated what I believe to be a proper division of an interstate rate which is sufficiently high to pay all operating expenses and a four per cent return. The same illustration would hold good if I had used a one per cent return or a ten per cent return or any other return. We may have some rates that pay an extremely small return and others that pay an extremely large one, but in any case they are equally susceptible to allocation between states in proportion to the operating expenses and the cost of the plant used in producing the service. Even if it should happen that some rate pays less than the full operating expenses with no return whatever I still believe that the total revenue should be allocated between states in proportion to the cost of service in order that each state might share proportionately in the loss.

Referring to Mr. Baker's statement that my method made no difference between high grade and low grade traffic or between high revenue and low revenue traffic, it is true that I have not segregated different classes of traffic, but in the case of North Dakota I have considered the total interstate traffic passing into or through the State as a whole. However, this includes all of the high grade traffic as well as all of the low grade traffic and in approximately the same proportion for North Dakota as for the system as a whole for the reason that North Dakota is near the center of the system and shares in practically all of the through traffic on the system with
288 the possible exception of the coal movement, largely confined to Minnesota, and the iron ore movement in Minnesota and Wisconsin. As to these, I pointed out that by excluding the Mesabi Division where that traffic is handled, the percentage allocated to North Dakota would be slightly reduced, and that by including the coal and ore traffic in the total for the system I have slightly favored North Dakota.

Referring to Mr. Baker's statement that my method was a denial of all facts as to geographical situations, I would say that exactly the contrary were so. The mileage prorate in allocating interstate revenue is a denial of all geographical situations as it regards every mile, wherever situated, as identical, whereas the fundamental purpose of my whole method is to give full effect to the geographical and physical situation, which are all reflected in the cost of service.

Referring to Mr. Baker's criticism that I throw all interstate revenue into one jackpot and assign to Washington and other western states a portion of the revenue on North Dakota-Minnesota traffic, I would say that that statement is

not correct. The total volume of the traffic between North Dakota and Minnesota is shown by the ton miles in those states and the entire ton miles made in that traffic are credited to North Dakota and Minnesota, none of it is credited to Washington or Idaho. I only credit to Washington and Idaho the ton miles actually made in those states. While the ton miles in Idaho and Washington are more expensive than those in Minnesota and North Dakota, the revenue received from those ton miles is correspondingly higher as testified to by Mr. Beidelman, and these revenues as well as the ton miles are thrown into the system revenue before making the apportionment. However, the volume of traffic moving only
289 between Minnesota and North Dakota, while substantial in itself, is relatively small as compared with the traffic moving all the way through North Dakota from East to West, and moving from Minnesota or beyond on the East and into Montana or beyond on the West. In the first place, the mileage made in North Dakota on this transcontinental traffic is two and a half times as long as the mileage made on the traffic originating and terminating within the State of North Dakota, and, therefore, it would take two and one-half tons of originating traffic to equal one ton of trans-state traffic as far as the ton miles produced in North Dakota is concerned. Now the tons originating and terminating in North Dakota are not two and one-half times as much as the trans-state tons, so that in the final analysis a little over 25% of the total ton miles made in North Dakota is on ton miles originating or terminating in that state and originating or terminating in Wisconsin and Minnesota both. The larger part of the North Dakota-Minnesota traffic consists of grain and the rates on this traffic are the lowest grain rates in the United States. The Canadian lines established very low grain rates by agreement with the Government in consideration of certain land grants and the Great Northern was forced to compete with these low Canadian rates at border points where North Dakota joins Canada, the Great Northern operations extending into Canada, which has the effect of lowering the rate structure on grain to all that upper section of North Dakota, with a result that the grain rates from North Dakota to Minnesota are much lower than the grain rates for corresponding destinations on any of the railroads to the south of the Great Northern into the primary markets. In view of the comparatively low revenues on that traffic, I think that North Dakota would not be hurt very much by having that revenue credited over the system with
290 other revenues.

As to the difference between the method used in Exhibit 12 and the method of prorating the revenue on

each individual shipment as illustrated in Exhibit 11, I would say that if we could take every individual shipment on the system and prorate it between the states where that shipment actually moves in proportion to the cost of service I think the result would not vary from my result by over a fraction of one per cent, and I base that opinion on all of the testimony that I have given heretofore, that North Dakota being one of the central states of the system with such a large volume of trans-state traffic of the same character as the general interstate traffic for the system, that such a treatment as you have suggested could have very little difference in the final result.

As to how the greatest possible variation that could occur in my method would compare with the errors which are necessarily involved in the five factor allocation used by the State of North Dakota, the method used by the state based on the apportionment of interstate revenue between states on a mileage prorate produces results that in themselves are grotesque and absurd and condemn that method. In some years it shows deficits in four or five states and provinces while showing high profits in others. It would spread the high terminal values in Superior, the Twin Cities and Puget Sound over the interior states and produce an exaggeration or distortion by producing an allocation factor for North Dakota that is approximately 50% too high. On the other hand, I do not believe that any correction which could properly be made in my exhibit 12, by using the most detailed study, would raise the percentage of 12.22% shown in Exhibit 12 to more than say 13% or less than 11½%.

As to the suggestion that North Dakota should have a higher value per mile than other states because of her low operating expenses, my exhibit 12 gives full recognition to the
291 lower operating expenses in North Dakota. As I stated, the purpose of page 2 of that exhibit is, first, to assign to North Dakota a correct proportion of the interstate freight revenue and having done that I then subtract the operating expenses actually incurred in the state. The mere fact that the operating expenses are low results in an increased net in the state, a net that is higher than it would be if the operating expenses were higher than they are, so that full recognition of the low operating cost in North Dakota is given in the net income before taxes on page 1 of Exhibit 12.

As to the suggestion that North Dakota should have a higher prorate of interstate revenues because her operating expenses are lower than those of terminal states, my whole develop-

ment on page 2 of Exhibit 12 goes to the error of making an apportionment on a prorate basis, thereby assigning revenues to the state of North Dakota where they are not needed to pay operating expenses and taking away from the terminal states revenues needed for paying their operations, resulting in a deficit being shown in those states and a high profit in North Dakota on the same shipment made on an over-all rate.

LYMAN BAKER, recalled by the defendants in sur-rebuttal testified as follows:

Direct Examination.

By Mr. Shaft:

Referring to the fact that in Exhibit N, in giving the valuation of the physical property for the years 1929, 1930, 1931 and 1932, I used the I. C. C. cost of reproduction less depreciation, plus additions and betterments as of the end of the year preceding the assessment years, whereas in 1933, I have used the I. C. C. valuation new without deductions, I will say that in all previous years in the tax reports of the Great Northern Railway Company showed the I. C. C. cost of reproduction, less depreciation. The report made in 1933
292 for the year ending December 31, 1932 showed I. C. C. valuation new and did not contain information as to the depreciated value. At the time I made up this table, I did not have that information or rather I secured it after I had a large part of my exhibits made up, and I did not make any change. That was information which was not presented to the Tax Commissioner for 1933.

Cross-Examination.

By Mr. Dorety:

I would agree on principle that the last line in Exhibit N should be changed from 14.32 to 13.85%. If the physical property factor is to be used, it should be the depreciated value. That would make my five factor average 18.25% instead of 18.34% as shown on Exhibit P, and if Mr. Turnburke's Exhibit 22 is to correctly show my position, the last figure should read 18.25 instead of 18.34%, on the five factor method, although I don't believe that I committed myself to the five factor method.

(At this point the defendant concluded its direct testimony and rested its case).

Whereupon, it was stipulated between the parties that the plaintiff's report to the State Tax Commissioner for 1933

is on an official form prescribed by the Commission and that it calls attention to the Statute of North Dakota requiring the railroad company to make its books and records accessible to the taxing officers, and that among other data which it requires the railway company to furnish was track mileage figures for the state and the system, car and locomotive figures, ton mile and passenger mile figures, gross revenue and physical valuation.

The Court: Let the record show on motion of the plaintiff the rest is withdrawn for the purpose of the stipulation
293 that is now in the record, and that defendants' rest be withdrawn for the purpose of offering Exhibit Z-2, and now having been received in evidence both sides rest.

Thereupon, the case was argued orally with the court both as to the law and the facts on behalf of both parties, and the court took the case under consideration and thereafter rendered its judgment.

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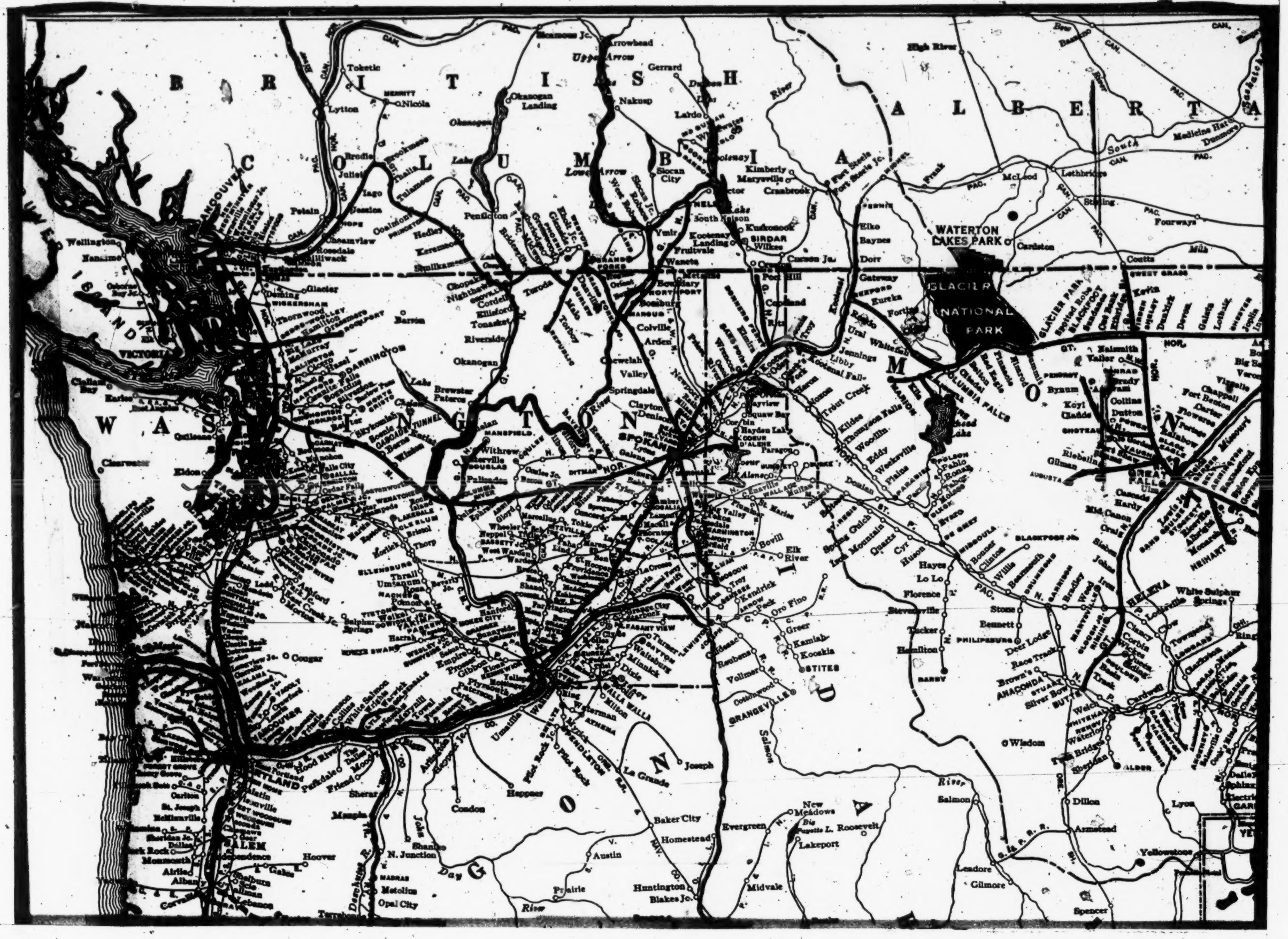
Plaintiff's Exhibit 1

Great Northern Railway Company

Year Ended		Passengers	Revenue per Passenger Mile (Cents)	L. C. L. Tons
June 30,	1909	7,138,742	2.240	630,027
"	1910	8,282,440	2.205	720,954
"	1911	8,362,189	2.273	719,553
"	1912	8,168,364	2.487	759,848
"	1913	8,595,073	2.503	867,879
"	1914	9,199,259	2.336	928,495
"	1915	8,468,317	2.289	878,893
December 31,	1916	8,168,937	2.360	978,188
"	1917	8,382,035	2.374	969,719
"	1918	7,264,346	2.608	838,831
"	1919	8,350,661	2.784	823,697
"	1920	8,538,912	3.000	899,668
"	1921	6,194,676	3.442	646,365
"	1922	5,509,459	3.358	645,326
"	1923	4,975,800	3.326	636,309
"	1924	3,940,656	3.240	585,485
"	1925	3,642,749	3.161	615,661
"	1926	3,081,457	3.185	588,690
"	1927	3,108,427	3.175	587,666
"	1928	2,512,026	3.124	595,613
"	1929	2,276,069	3.070	592,642
"	1930	1,694,437	3.082	458,089
"	1931	1,070,044	2.800	372,218
"	1932	845,213	2.400	273,160
"	1933	876,841	1.991	261,503

Accounting Department,
Office of Comptroller,
September 24, 1934.


BRITISH COLUMBIA
ALBERTA
WASHINGTON
OREGON
IDAHO
MONTANA
Vancouver
Victoria
Seattle
Tacoma
Spokane
Portland
Salem
Eugene
Boise
Helena
Great Falls
Butte
Missoula
Lethbridge
Medicine Hat
Calgary
Edmonton
Kamloops
Nelson
Cranbrook
Fernie
Revelstoke
Penticton
Okanogan
Wenatchee
Yakima
Walla Walla
Lewiston
Pullman
Moscow
Coeur d'Alene
Kellogg
Wallace
Missoula
Kalispell
Whitefish
Glacier National Park
Waterton Lakes Park
Columbia Falls
Bonner
Hamilton
Dillon
Bozeman
Livingston
Billings
Miles City
Havre
Lewistown
Fergus
Judith
Big Sandy
Valier
Shelby
Cut Bank
Conrad
Kevin
Sunburst
Galata
Lothair
Devlin
Dunkirk
Coutts
Milk
Fourways
Stirling
Taber
Coaldale
Lethbridge
Fort Steele
Kimberley
Marysville
Slocan City
Kaslo
Nakusp
Arrowhead
Gerrard
Lardo
Duncan
Okanagan Landing
Vernon
Kelowna
Penticton
Princeton
Merritt
Nicola
Lytton
Toketic
Brodie
Juliet
Tago
Ossoyoos
Oroville
Molson
Chesaw
Curlew
Republic
Kettle Falls
Colville
Arden
Valley
Springdale
Clayton
Deer Park
Spokane
Hayden Lake
Coeur d'Alene
Paragon
Wallace
Mullan
Kellogg
Osburn
Wardner
Bovill
Elk River
Troy
Moscow
Pullman
Colfax
Palouse
Genesee
Uniontown
Endicott
Rosalia
Tekoa
Oakesdale
Garfield
Farmington
Steptoe
Lacrosse
Pullman
Moscow
Lewiston
Asotin
Clarkston
Dayton
Waitsburg
Prescott
Walla Walla
Milton
Athena
Weston
Pendleton
Hermiston
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Dorr
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Jennings
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Fortine
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Hungry Horse
Coram
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Belton
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Polebridge
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Cardston
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Lethbridge
Monarch
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Nanton
Vulcan
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Lomond
Milo
Vauxhall
Taber
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Coutts
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Wildhorse
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Strathmore
Cheadle
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Chestermere
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Airdrie
Crossfield
Beiseker
Three Hills
Trochu
Linden
Acme
Carbon
Drumheller
Rosedale
Hanna
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Consort
Veteran
Castor
Coronation
Stettler
Big Valley
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Dayton
Starbuck
Pomeroy
Garfield
Farmington
Steptoe
Lacrosse
Pullman
Moscow
Lewiston
Asotin
Clarkston
Uniontown
Endicott
Rosalia
Tekoa
Oakesdale
Colfax
Palouse
Genesee
Troy
Moscow
Bovill
Elk River
Wallace
Mullan
Kellogg
Osburn
Wardner
Coeur d'Alene
Hayden Lake
Paragon
Spokane
Deer Park
Clayton
Springdale
Valley
Chewelah
Arden
Colville
Kettle Falls
Republic
Curlew
Molson
Oroville
Tonasket
Riverside
Okanogan
Omak
Brewster
Pateros
Chelan
Manson
Wenatchee
Cashmere
Leavenworth
Peshastin
Dryden
Cle Elum
Roslyn
Ellensburg
Thrall
Vantage
Beverly
Ephrata
Soap Lake
Coulee City
Wilbur
Creston
Davenport
Reardan
Odessa
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Sprague
Cheney
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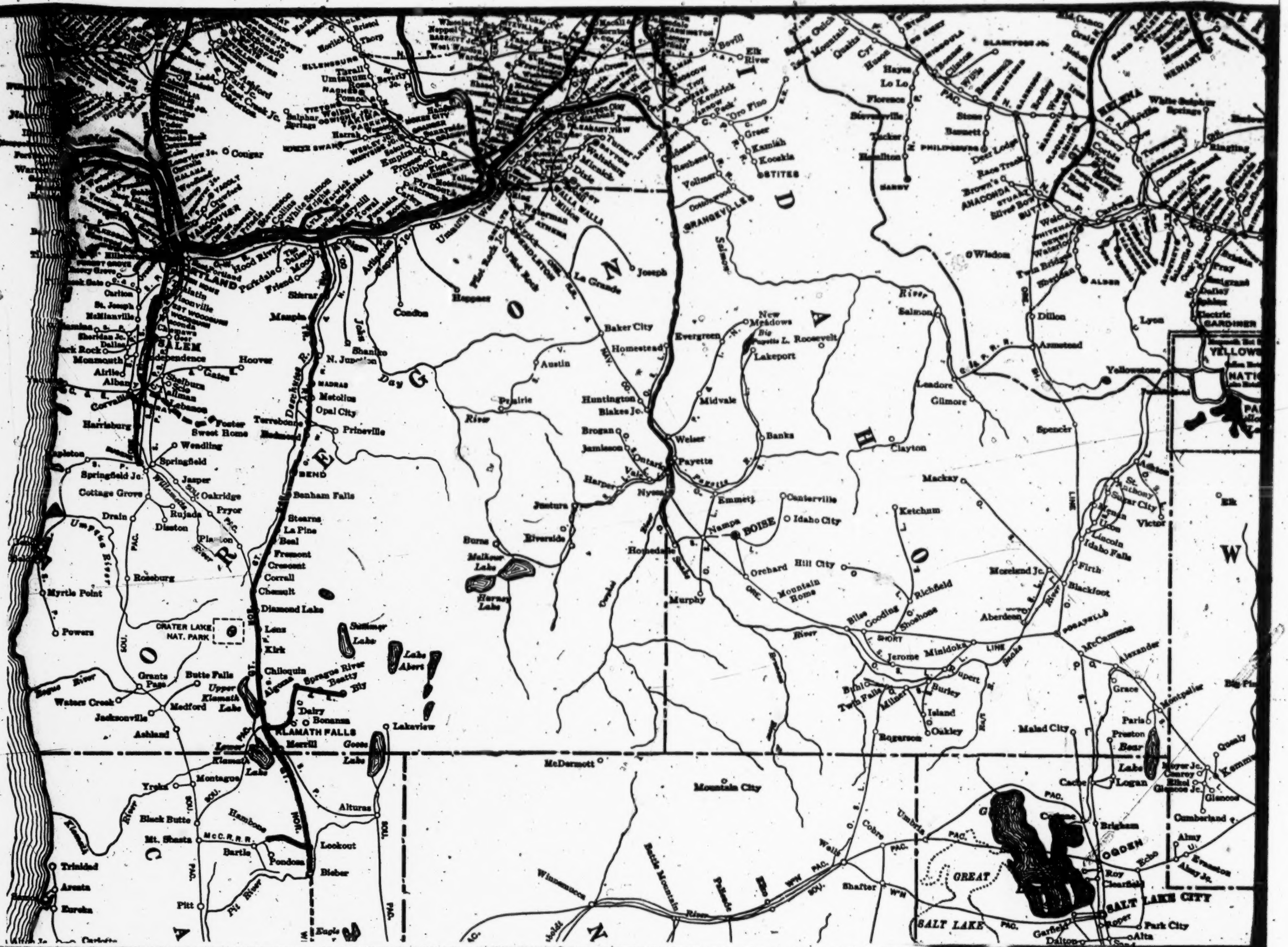
Fairfield
Rockford
Latah
Tekoa
Oakesdale
Tekoa
Rosalia
Endicott
Uniontown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Carlton
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Dallas
Monmouth
Airlie
Albany
Corvallis
Harrisburg
Lebanon
Sweet Home
Foster
Gates
Hoover
Scio
Shelburn
Gilman
Independence
Wendling
Springfield
Springfield Jct.
Cottage Grove
Drain
Oakridge
Rujada
Pryor
Disston
Plainton
Roseburg
Myrtle Point
Powers
Coos River
Umpqua River
Willamette River
Tillamook
Astoria
Seaside
Cannon Beach
Hood River
The Dalles
Moro
Shaniko
Antelope
Heppner
Condon
Arlington
Boardman
Umatilla
Hermiston
Pendleton
Pilot Rock
Athena
Walla Walla
Milton
Dixie
Wallula
Prosser
Grandview
Sunnyside
Toppenish
Wapato
Yakima
Ellensburg
Thrall
Thorp
Cle Elum
Roslyn
Easton
Bristol
Harlock
Vantage
Beverly
Othello
Connell
Ritzville
Warden
Moses Lake
Wilbur
Creston
Davenport
Reardan
Odessa
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Soap Lake
Coulee City
Wenatchee
Entiat
Chelan
Lake Chelan
Stehekin
Leavenworth
Cashmere
Peshastin
Dryden
Monitor
Cashup
Winthrop
Twisp
Carlton
Methow
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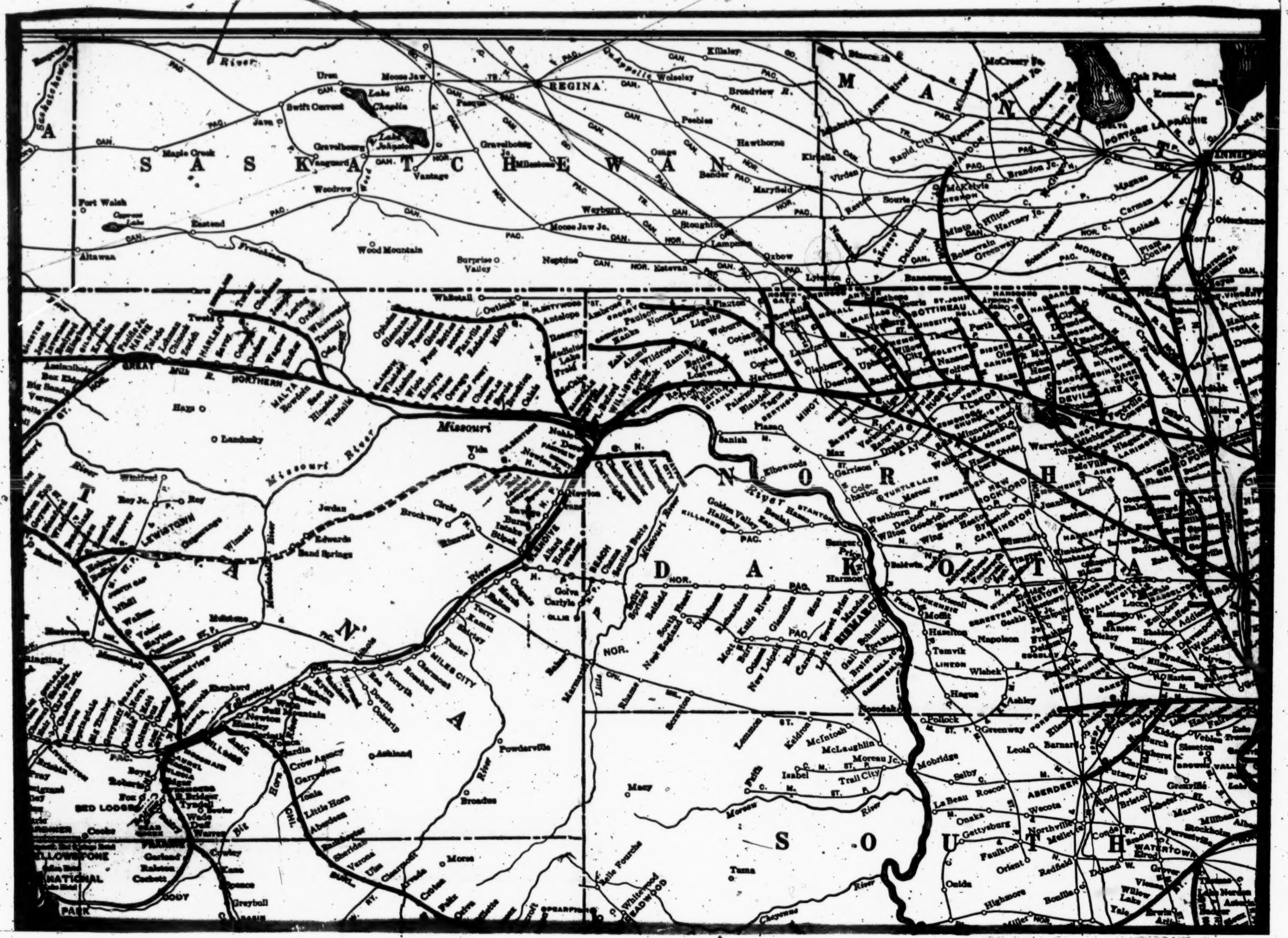
Brewster
Bridgeport
Orondo
Waterville
Douglas
Mansfield
Coulee City


SASKATCHEWAN
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Eastend
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Vanguard
Vantage
Woodrow
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Olive
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Greybull
Basin
Cody
Powell
Deaver
Frannie
Lovell
Kane
Garland
Raleton
Corbett
Cowley
Greeley
Burgess
Bridger
Tyndall
Wade
Dull
Warren
Fox
Red Lodge
Roberts
Boyd
Robertson
Edgar
Belfry
Bear Tooth
Silesia
Absarokee
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Livingston
Springdale
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Duck Mts.
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McLaughlin
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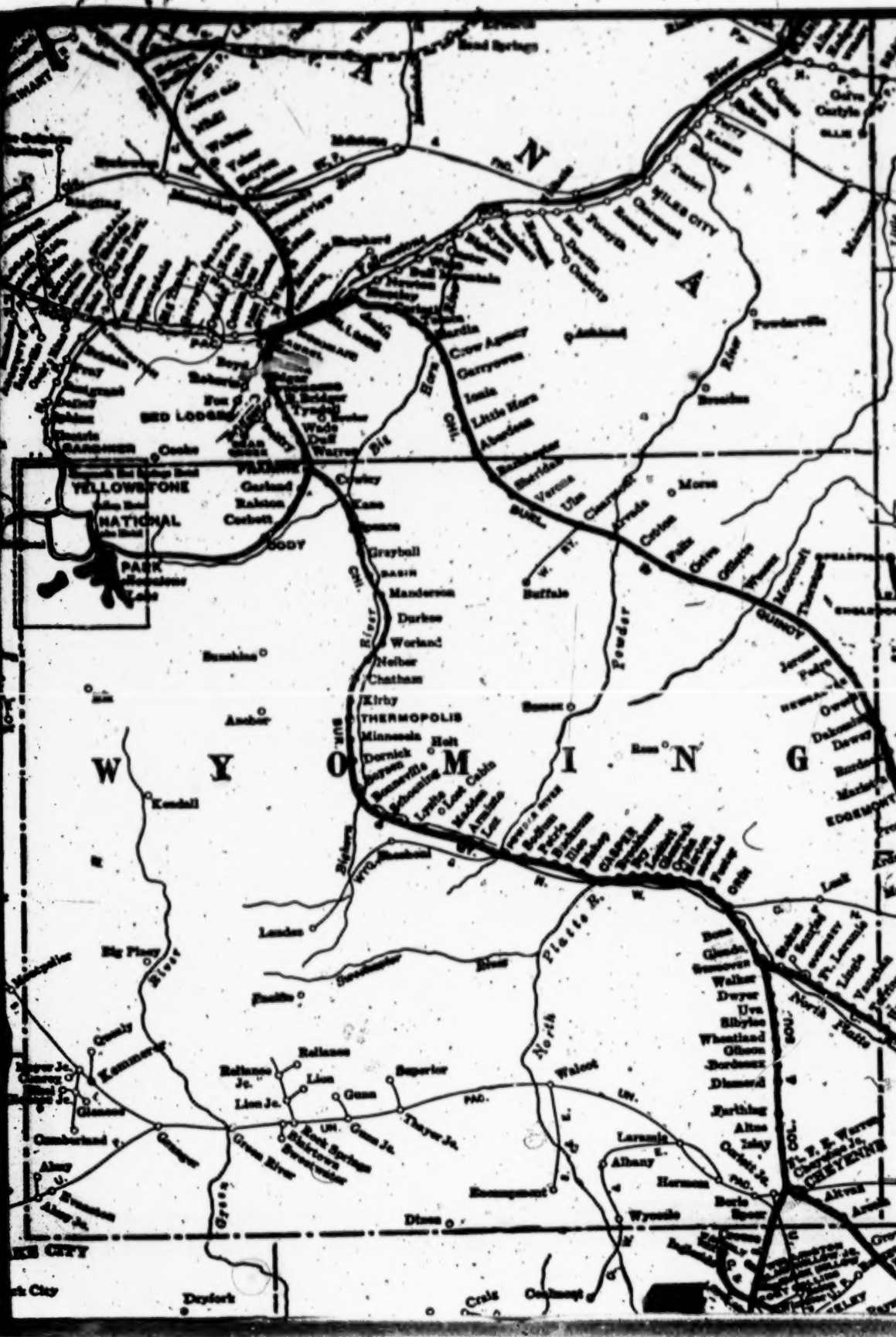
Lake Whitewood
Whitewood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Powder River
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Little Horn
Tongue
Crow Agency
Garryowen
Lodge Grass
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Ashland
Birney
Decker
Kirby
Sheridan
Dayton
Parkman
Story
Big Goose
Wolf
Dull Knife
Warren
Clear Creek
Greybull
Basin
Manderson
Worland
Hyattville
Meeteetse
Thermopolis
Hot Springs
Minnesela
Dorrick
Boysen
Riverside
Lysite
Lost Cabin
Arminto
Kaycee
Buffalo
Powder River
Barnum
Midwest
Edgerton
Kaycee
Casper
Bessemer
Evansville
Mills
Glenrock
Douglas
Converse
Orpha
Orin
Glendo
Guernsey
Wendover
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Whalen
Dwyer
Uva
Bluejoint
Wheatland
Gilchrist
Bordeaux
Diamond
Farthing
Altus
Isley
Cheyenne Jct.
Pine Bluffs
Albin
Hillsdale
Burns
Egbert
Laramie
Albany
Harmony
Rawlins
Walcott
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Encampment
Riverside
Dixon
Wyarno
Baggs
Dixon
Creston Jct.
Cumberland
Gateway
Green River
Rock Springs
Blairtown
Superior
Lion
Lion Jct.
Rollins
Rollins Jct.
Thayer Jct.
Granger
Kemmerer
Quealy
Big Piney
Marbleton
Pinedale
Daniel
Boulder
Fort Bridger
Lyman
Evanston
Piedmont
Urie
Robertson
Mountain View
Lonetree
Hilliard
Verona
Utah
Cherokee
Arvada
Colona
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Moorcroft
Sundance
Hulett
Aladdin
Alva
Beulah
Reuter
Recluse
Gillette
Wright
Rozet
Moore
Dakota
Dewey
Barber
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Manville
Van Tassell
Lance Creek
Keeline
Shawnee
Orpha
Douglas
Converse
Glenrock
Bessemer
Evansville
Mills
Casper
Midwest
Edgerton
Kaycee
Buffalo
Powder River
Barnum

D A K O T A
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D A K O T A
N E B R A S K A
PIERRE
ABERDEEN
SIOUX FALLS
RAPID CITY
ALLIANCE
NORTHPORT
HOT SPRINGS
STERLING
IMPERIAL
Missouri River
White River
Cheyenne River
Moreau River
Niobrara
Platte
Winner
Dallas
Presho
Reliance
Gettysburg
Faulkton
Orient
Redfield
Highmore
Blunt
Miller
Wessington Springs
Stickney
Tripp
Spencer
Newport
Long Pine
Crofton
Bloomfield
Wynot
Hemingford
Lakeside
Elsworth
Ashby
Hyannis
Whitman
Wolf
Hicks
Mullen
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Thedford
Dunlap
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Merna
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Brunswick
Oakdale
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Superior
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Ravenna
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Gibbon
Shelton
Kearney
Minatare
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Bridgeport
Alliance
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Oshkosh
Broadwater
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Marquette
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Ogallala
Roscoe
Lamar
Wauneta
Imperial

MAP

SHOWING

Great Northern Railway System - ——

(Broken Lines indicate trackage rights over S. P. & S. and Oregon Trunk)

Chicago, Burlington & Quincy R. R. ——

Spokane, Portland & Seattle Railway - }——

And Its Subsidiary Lines

(Owned by Northern Pacific and Great Northern Railway Companies Jointly)

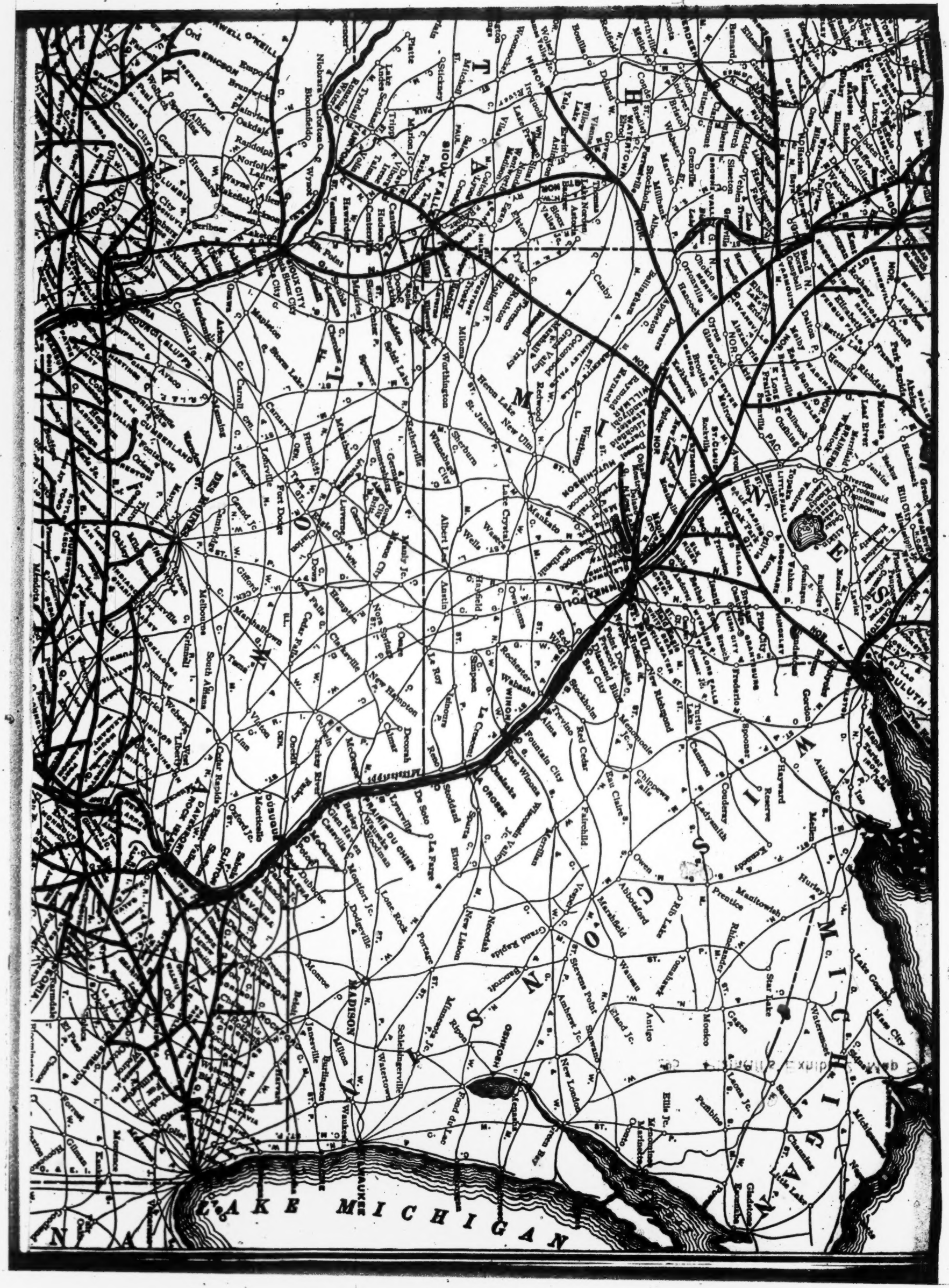
Colorado & Southern Railway Lines - }——

(Controlled by Chicago, Burlington & Quincy Railroad Company)

Trinity & Brazos Valley Railway - - - ——

December 31, 1929

WINNIPEG
St. Boniface
Oak Point
Komarno
Gimli
Selkirk
Lac du Bonnet
Molson
Whitemouth
Kenora
Vermilion
Eagle River
English River
Rainy River
Rainy Lake
Ft. Frances
International Falls
Beaudette
Warroad
Roseau
Mendus
Badger
Greenbush
Strathcona
Middle River
Stephen
Argyle
Warren
Thief River Falls
St. Hilaire
Red Lake Falls
Plummer
Erskine
Fosston
Bagley
Farley
Hines
Funkley
Kelliher
Northome
Gemmell
Margie
Grand Falls
Whaner
Haley
Tower
Vermilion Lake
Winton
Virginia
Hibbing
Chisholm
Keewatin
Nashwauk
Grand Rapids
Swan River
Hackensack
Hill City
Backus
Jenkins
Akeley
Park Rapids
Frazee
Richdale
Menahga
Leaf River
Merrifield
Brainerd
Wheelock
Riverton
Trommald
Motley
Crosby
Ironton
Deerwood
Aitkin
Cuyuna
Rutledge
Moose Lake
Groningen
Wahkon
Topeka
Little Falls
Royalton
Brookpark
Pine City
Grantsburg
Rush City
Taylors Falls
Dresser Jc.
Turtle Lake
Cameron
Ladysmith
Rice Lake
Eau Claire
Menomonie
Chippewa Falls
New Richmond
Hudson
St. Paul
Minneapolis
Red Cedar
Fairchild
Trevino
Alma
Merrill
Stockholm
Point Douglas
Prescott
Diamond Bluff
Bay City
Hayward
Reserve
Spooner
Couderay
Frederic
Osceola
Dalbo
Isanti
Cambridge
Braham
Milaca
Princeton
Elk River
Rockford
St. Cloud
Rockville
Kimball
Watkins
Meeker
Litchfield
Darwin
Atwater
Willmar
Raymond
Maynard
Spicer
New London
Kandiyohi
Sunburg
Svea
Benson
Kerkhoven
Cyrus
Glenwood
Sauk Center
Melrose
Albany
Avon
Sauk Rapids
Oak Park
Rice
Watab
Ogilvie
Mora
Milaca
Swanville
Long Prairie
Eagle Bend
Fallbrook
Cushing
Melby
Dalton
Elbow Lake
Erdahl
Evansville
Alexandria
Osakis
Barrett
Hoffman
Elrosa
Kensington
Starbuck
Glenwood
Lowry
Villard
Morris
Otterburne
Marchand
Stuartburn
Roseau
Emerson
Noyes
Gretna
Plum Coulee
Roland
Carman
Magnus
Portage La Prairie
Delta
Headingley
Portage Jc.
Winnipeg Beach
Gimli
Selkirk
Lac du Bonnet
Whitemouth
Kenora
Vermilion
Eagle River
Hunters Island
Gunflint
Gravel Lake
Grand Marais
Echo Lake
Finland
Hornby
Two Harbors
Duluth
Superior
Lake Superior
Lake Gogebic
Mass City
Watersmeet
Michigamme
Nestoria
Ishpeming
Negaunee
Marquette
Escanaba
Gladstone
Manistique
Marinette
Menominee
Iron Mountain
Crystal Falls
Florence
Amberst Jc.
Stevens Point
Wausau
Antigo
Rhinelander
Monico
Tomahawk
Rib Lake
Abbotsford
Marshfield
Owen
Merrill
Vesper
Arpin
Pittsville
Wisconsin Rapids
Nekoosa
Port Edwards
Necedah
Tomah
La Crosse
Winona
Rochester
Austin
Albert Lea
Mankato
New Ulm
Sleepy Eye
Springfield
Redwood Falls
Marshall
Tracy
Lucan
Wabasso
Redwood Falls
Minneota
Ivanhoe
Marshall
Canby
Watertown
Willmar
Hutchinson
Glencoe
Winthrop
Arlington
Gaylord
Hector
Buffalo
Delano
Montrose
Waverly
Howard Lake
Watertown
Mayer
Norwood
Young America
Carver
Chaska
Shakopee
Minneapolis
St. Paul
Hastings
Red Wing
Wabasha
Lake City
Reads Landing
Alma
Fountain City
Winona
La Crescent
Houston
Caledonia
Spring Grove
Harmony
Preston
Fountain
Lanesboro
Whalan
Peterson
Rushford
Mabel
Caledonia
Houston
Hokah
Brownsville
La Crescent
Winona
Minnesota City
Stockton
Utica
Dakota
Homer
Minnesota City
Winona
Goodview
Wilson
Stockton
Rollingstone
Minnesota City
Utica
Dakota
Homer


LAKE MICHIGAN
MINNEAPOLIS
ST. PAUL
DULUTH
MADISON
MILWAUKEE
SIOUX FALLS
SIOUX CITY
COUNCIL BLUFFS
DES MOINES
OMAHA
MINNESOTA
IOWA
NEBRASKA
SOUTH DAKOTA
WISCONSIN
MICHIGAN

Plaintiff's Exhibit 3

Great Northern Railway Company

Valuation Division

Units Per Mile of Road

North Dakota and Remainder of System

	Grading					Tunnels	Bridges				Snow Sheds	Signals
	Common Cu. Yds.	Hard Pan Cu. Yds.	Loose Rock Cu. Yds.	Solid Rock Cu. Yds.	Total Cu. Yds.	Lin. Ft.	Steel Lbs.	Timber MBM	Concrete Slabs Each	Rail G. T.	Lin. Ft.	Miles
Main Line—North Dakota	38,301	11	1,550	49	39,911	00	25,525	2.550	0.63	194.37	00	0.58
Branch Lines—North Dakota	18,762	143	1,222	189	20,316	1.24	5,623	5.344	.00	106.43	00	00
Total—North Dakota	26,397	92	1,351	134	27,974	0.76	13,400	4.352	0.24	141.80	00	0.23
Remainder of System	36,640	5,394	1,637	3,373	47,044	16.59	30,048	8.669	0.49	176.04	1.98	0.36
Percentage, North Dakota to Remainder of System	.720	.017	.825	.040	.595	.046	.446	.502	.49	.805	0	.639

Valuation Office,
St. Paul, Minnesota,
April 23 and September 20th, 1934.

297 Plaintiff's Exhibit 4

Great Northern Railway Co.

Terminals at St. Paul–Minneapolis, Lake Superior and Puget Sound, December 31, 1932.

Location	Value	
St. Paul	$15,671,746	
Minneapolis	16,294,820	$31,966,566
Superior	5,625,959	
Allouez	12,433,220	18,059,179
Deita	1,567,717	
Everett	1,321,859	
Seattle	15,888,800	18,778,376
Total		$68,804,121

Valuation Office,
September 29th, 1934

298 Plaintiff's Exhibit 5

Great Northern Railway Co.

Principal terminals (Not including those at St. Paul—Minneapolis, Lake Superior or Puget Sound, Dec. 31, 1932.

State	Miles	Terminals
Wisconsin	38.35	None
Minnesota	2072.20	Willmar Breckenridge St. Cloud Cass Lake Kelly Lake Crookston
North Dakota	1917.41	Grand Forks Minot Fargo Williston Devils Lake
South Dakota	364.14	Watertown
Iowa	78.02	Sioux City
Montana	1861.24	Glasgow Havre Great Falls Blackfoot Whitefish Butte

Idaho	107.40	None
Washington	959.00	Hillyard Appleyard Marcus
Oregon	94.36	Klamath Falls
California	99.24	None
Total Miles	7591.36	

Total Terminals	23
Average miles per terminal	330
Average miles per terminal in No. Dak.	383

Valuation Office,
September 28, 1934

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299 Plaintiff's Exhibit 6

Great Northern Railway Co.

Mileage Statement

State	Total	Main	Branch	% Main	% Branch
Wisconsin	38	38	0	100.0	0
Minnesota	2072	1057	1015	51.0	49.0
Iowa	78	78	0	100.0	0
North Dakota	1918	735	1183	38.3	61.7
South Dakota	364	13	351	3.5	96.5
Montana	1861	1308	553	70.3	29.7
Idaho	108	81	27	75.0	25.0
Washington	959	472	487	49.2	50.8
Oregon	94	94	0	100.0	0
California	99	66	33	66.7	33.3
Total	7591	3942	3649	51.9	48.1
Less N. D.	1917	735	1182		
Balance of System in U. S.	5674	3207	2467	56.5	43.5
U. S. less N. D.	5674	3207	2467		
Canada	360	0	360		
Total	6034	3207	2827	53.0	47.0

Valuation Office,
September 28th, 1934

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Plaintiff's Exhibit 7

Great Northern Railway Co.

Miles of Road and Cost of Reproduction New Less Depreciation as of 1915 plus Additions and Betterments to December 31, 1932

	Mileage	
Wisconsin	38.35	$ 21,849,997
Minnesota	2,072.20	136,222,956
Iowa	78.02	5,735,942
North Dakota	1,917.41	78,190,762
South Dakota	364.14	9,051,582
Montana	1,861.24	136,169,327
Idaho	107.40	10,926,120
Washington	959.00	122,365,484
Oregon	94.36	7,781,644
California	99.24	4,244,370
Total United States	7,591.36	532,538,184
Canada (Investment)	359.96	32,070,504
	7,951.32	564,608,688

Reproduction plus Additions and Betterments per mile—No. Dak.	$40,779
Balance System in U. S.	80,076
Ratio Balance System to North Dakota	196
Reproduction plus A. & B. per mile—Balance of System including Canada	80,614
Ratio to North Dakota	198

Valuation Office
September 28, 1934

Plaintiff's Exhibit 8

Statement of Capital Stock, Bonds and Other Securities of Other Companies and Other Non-Operating Property Owned by The Great Northern Railway Company and Estimated Amount to Be Deducted From Total Market Value of Stocks and Bonds of Great Northern Railway Company.

Security	Par Value	Book Value		Estimated Amount to be Deducted from System Stock and Bond Value
1. Brandon, Devils Lake & Southern Ry. Co.				
Stock	$ 650,500	$ 650,500		
Assessed Valuation, 1933			$ 155,634	
B. D. L. & S. Ry. Co. owns Farmers Grain & Shipping Co.				
Stock $121,025				
Bonds 438,000				
Assessed Valuation, 1933			627,808	$ 783,442
2. Canadian Rockies Hotel Co., Ltd.				
Stock	727,500	727,500		
Assessed Valuation, 1933			$ 350,000	
Owns Province of Alberta Bonds $144,000				
Annual Interest received $6,480. Capitalized at 6%			108,000	458,000
3. Chicago, Burlington & Quincy R. R. Co.				
Stock	83,017,900	109,245,456		
5 yr. average annual dividends, $7,969,718. Capitalized at 6%				132,828,633
4. Cottonwood Coal Co.				
Stock	1,000,000	1,000,000		
Assessed Valuation,				273,213
This amount does not include value of unmined coal in Montana which is taxed on Net Proceeds of Mines. Estimated amount, 150,000,000 tons.				
5. Dakota and Great Northern Townsite Co.				
Stock	50,000	25,000		
Assessed Valuation,				1,723,892
6. Duluth & Superior Bridge Co.				
Stock	200,000	200,000		
Bonds	650,000	650,000		
Bonds	296,000	295,100		
Five year average dividends and interest received, $87,419. Capitalized at 6%				1,456,983
7. Lake Superior Terminal & Transfer Ry. Co.				
Stock	169,800	169,800		
Five year average dividends received, $8,150. Capitalized at 6%				135,833
8. Somers Lumber Company				
Stock	1,150,000	1,240,000		
Assessed Valuation,			$2,841,375	
Less unpaid purchase price,			962,807	1,878,568
9. Spokane, Coeur d'Alene & Palouse Ry. Co.				
Stock	20,000	20,000		
Assessed Valuation,				828,424
10. Spokane, Portland & Seattle Ry. Co.				
Stock	20,000,000	20,000,000		
Bonds	36,855,000	25,798,500		
Assessed Valuation,				
(Operating Property Only) S. P. & S. Washington			$23,900,000	
" " " S. P. & S. Oregon			8,507,037	
S. P. & S. owns Oregon Trunk Washington			500,000	
" " " " Oregon			3,290,755	
S. P. & S. owns Oregon Electric Oregon			2,692,750	
S. P. & S. owns United Railways Oregon			1,494,285	
			$40,384,827	
Great Northern one-half interest.				20,192,414

	Stock	1,150,000	1,240,000		
	Assessed Valuation,			$2,841,375	
	Less unpaid purchase price,			962,807	1,878,568
9.	Spokane, Coeur d'Alene & Palouse Ry. Co.				
	Stock	20,000	20,000		
	Assessed Valuation,				828,424
10.	Spokane, Portland & Seattle Ry. Co.				
	Stock	20,000,000	20,000,000		
	Bonds	36,855,000	25,798,500		
	Assessed Valuation,				
	(Operating Property Only) S. P. & S. Washington			$23,900,000	
	" " " S. P. & S. Oregon			8,507,037	
	S. P.& S. owns Oregon Trunk . Washington			500,000	
	" " " " Oregon			3,290,755	
	S. P. & S. owns Oregon Electric Oregon			2,692,750	
	S. P. & S. owns United Railways Oregon			1,494,285	
				$40,384,827	
	Great Northern one-half interest.				20,192,414
11.	Twin City Belt Railway Company				
	Stock	30,000	30,000		
	Assessed Valuation,			65,615	
	Great Northern one-third interest,				21,872
12.	Washington & Great Northern Townsite Co.				
	Stock	50,000	15,939		
	Assessed Valuation,			$ 649,690	
	W. & G. N. T. Co. owns Glazier Park Hotel Co., Assessed Valuation,			915,802	1,565,492
302 13.	Western Fruit Express Co.				
	Stock	$ 6,800,000	$ 6,800,000		
	Five year average annual dividends received, $746,700. Capitalized at 6%				$ 12,445,000
14.	Crow's Nest Pass Coal Co., Ltd.				
	Stock	491,700	810,210		
	Five year average annual dividends received, $23,058. Capitalized at 6%				384,300
15.	St. Paul Foundry Company				
	Stock	310,800	233,100		
	Five year average annual dividends received, $27,195. Capitalized at 6%				453,250
16.	Wisconsin Central Ry. Co.				
	Terminal Bonds	275,000	247,500		
	Five year average annual interest received, $9,625. Capitalized at 6%				160,417
17.	Cowlitz, Chehalis & Cascade Ry. Co.				
	Bonds	125,250	125,250		
	Five year average annual interest received, $7,515. Capitalized at 6%				125,250
18.	Hill City Railway Company				
	Bonds	25,000	25,000		
	Three year average annual interest received, $1,250. Capitalized at 6%				20,833
19.	Land Grant Lands, 114,707 acres				
	Estimated value,				1,000,000
20.	Locally Assessed Property,				
	Assessed Valuation,				5,500,000
	Totals,	$152,894,450	$168,308,855		$182,235,816

Great Northern Railway Company
Tax Division—
St. Paul, Minnesota.

Plaintiff's Exhibit 9

Statement Showing, by States, The Assessed Valuation of The Great Northern Railway Company's Operating Property for The Years 1932 and 1933, Also Interstate Commerce Commission Cost of Reproduction Less Depreciation Plus Additions and Betterments and The Proportion Which The Assessed Valuation for Each State Is of Said Cost of Reproduction.

State	1932 Assessed Valuation	I. C. C. Cost of Reproduction Less Depreciation Plus Additions and Betterments to December 31, 1931	Ratio	1933 Assessed Valuation	I. C. Cost of Reproduction Less Depreciation Plus Additions and Betterments to December 31, 1932	Ratio
Wisconsin	$ 13,300,000	$ 22,355,155	59.49%	$ 11,750,000	$ 21,849,997	53.78%
Iowa	2,001,057	5,716,635	35.00%	1,616,965	5,735,942	28.19%
South Dakota	6,800,000	9,014,589	75.43%	5,990,000	9,051,582	66.18%
Montana	80,068,225	137,823,113	58.09%	71,718,016	136,169,327	52.67%
Idaho	4,996,540	11,051,805	45.21%	4,496,886	10,926,120	41.16%
Washington	69,574,000	122,166,455	56.95%	66,099,986	122,365,484	54.02%
Oregon	2,769,505	6,478,671	42.75%	2,561,125	7,781,644	32.91%
Total 7 States	$179,509,327	$314,606,423	57.06%	$164,232,978	$313,880,096	52.32%
North Dakota	78,849,997	78,057,683	101.02%	78,832,888	78,190,762	100.82%
Total 8 States	$258,359,324	$392,664,106	65.80%	$243,065,866	$392,070,858	62.00%

Great Northern Ry. Co.
Tax Division
St. Paul, Minnesota.

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Plaintiff's Exhibit 10

Great Northern Railway Company

Name of Line	1933 Assessment	Reproduction Cost New	% Assmt. to Reproduction	Miles of Road	Assessment Per Mile
Great Northern	$78,832,888	$89,964,680	87.63%	1,913.12	$41,206.45
Northern Pacific	61,293,106	82,960,434	73.88%	1,521.08	40,295.78
M. St. P. & S. S. M.	22,282,990	38,079,645	58.52%	1,314.43	16,952.59
C. M. St. P. & P.	8,147,354	11,680,061	69.75%	372.30	21,883.84

Tax Division
St. Paul, Minnesota.

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Plaintiff's Exhibit 11

Apportionment of Revenue on Mileage Prorate Basis

30-Ton Shipment

State	Miles Hauled (1)	Net Ton Miles (2) = 30 tons x Col. 1	Approximate Cost Per 100 Ton Miles: Operating Cost (3)	Allowance for use of property at 4% (4)	Total Cost Per Car: For Operating Expenses (5) = (2) x (3)	For use of property at 4% (6) = (2) x (3)	Total (7) = 5+6	Mileage Prorate Basis of Dividing Through Revenue As Used by Tax Comm'r of North Dakota: Through revenue 80¢ cwt. or $16 per ton divided in proportion to miles hauled—Col. 1. (8)	Percent return on property used (9)
Wash.	400	12000	$.95	$.45	$114	$54	$168	$106.67	(deficit)
Mont & Idaho	800	24000	.55	.25	132	60	192	213.33	5.4%
N. Dak	400	12000	.50	.20	60	24	84	106.67	7.8%
Minn	200	6000	.40	.20	24	12	36	53.33	9.7%
Total	1800	54000					$480	$480.00	4.0%

Plaintiff's Exhibit 12

Schedule A

Great Northern Railway Company

Percentage of System Net Railway Operating Income (Excluding Taxes) Earned in North Dakota with Interstate Freight Revenue Apportioned Between States on a Cost Basis

1928 – 1932

	1928	1929	1930	1931	1932	Total Five years 1928–1932	Total Three Years 1930–1932	
North Dakota:								
I Operating revenues:								
A—Freight								
1—Intrastate	$ 1,289,150	$ 1,407,295	$ 1,238,744	$ 1,019,373	$1,063,937	$ 6,018,499	$ 3,322,054	Annual Report to Railroad Commissioners of North Dakota
2—Interstate apportioned on cost basis	14,338,757	13,630,593	11,735,699	9,030,625	6,827,157	55,562,833	27,593,481	Schedule B
B—All other operating revenues	3,985,528	4,379,102	3,494,523	2,475,824	1,836,677	16,171,654	7,807,024	Annual Report to Railroad Commissioners of North Dakota
C—Total operating revenues	19,613,435	19,416,992	16,468,966	12,525,822	9,727,771	77,752,986	38,722,559	Item I A plus item I B
II Operating expenses	13,949,468	14,079,678	12,551,779	9,966,340	8,470,999	59,018,264	30,989,116	Annual Report to Railroad Commissioners of North Dakota
III Net revenue from railway operations	$ 5,663,967	$ 5,337,314	$ 3,917,187	$ 2,559,482	$1,256,772	$ 18,734,722	$ 7,733,441	Item I minus item II
IV Uncollectible railway revenues	$ 2,092	$ 2,553	$ 1,489	$ 1,570	$ 2,440	$ 10,144	$ 5,499	Schedule A
V Equipment rents, Dr.	328,097	193,277	267,201	301,074	314,830	1,404,479	883,105	Schedule D
VI Joint facility rents, Cr.	365	360	63	451	352	1,591	866	Schedule C
VII Total uncollectible railway revenues equipment and joint facility rents—Net Dr.	$ 329,824	$ 195,470	$ 268,627	$ 302,193	$ 316,918	$ 1,413,032	$ 887,738	Sums of items IV, V and VI
VIII Net railway operating income excluding taxes	$ 5,334,143	$ 5,141,844	$ 3,648,560	$ 2,257,289	$ 939,854	$ 17,321,690	$ 6,845,703	Item III minus item VII
System:								
IX Net railway operating income	$31,294,069	$32,457,523	$21,912,508	$12,669,420	$1,290,551	$ 99,624,071	$35,872,479	Annual Report to Tax Commissioners of North Dakota, 1932
X Railway tax accruals	10,297,997	9,201,154	8,712,598	7,179,028	6,697,424	42,088,201	22,589,050	" " " " " "
XI Net railway operating income excluding taxes	41,592,066	41,658,677	30,625,106	19,848,448	7,987,975	141,712,272	58,461,529	Item IX plus item X
North Dakota Per Cent of System Net Railway Operating Income Excluding Taxes	12.82	12.34	11.91	11.37	11.77	12.22	11.71	Item VIII divided by item XI

Schedule B

Great Northern Railway Company

Division of Interstate Freight Revenue on Basis of Cost

1928 - 1932

		1928			1929			1930		
		System (1)	North Dakota (2)	All Other (3) = 1-2	System (4)	North Dakota (5)	All Other (6) = 4-5	System (7)	North Dakota (8)	All Other (9) = 7-8
1.	Freight operating expenses	$61,788,500	$10,167,151	$51,621,349	$61,402,640	$10,031,100	$51,371,540	$52,259,982	$ 8,742,710	$43,517,272
2.	Hire of equipment—freight proportion—Dr.	1,723,924	368,222	1,355,702	1,080,461	210,574	869,887	1,389,890	274,852	1,115,038
3.	Joint facility rents—freight proportion	Dr. 280,586	Cr. 266	Dr. 280,852	Dr. 298,220	Cr. 256	Dr. 298,576	Dr. 322,248	Cr. 44	Dr. 322,292
4.	Allowance for use of property based on I. C. C.'s cost of reproduction new, less depreciation, plus additions and betterments since valuation date—freight proportion	30,890,521	4,185,460	26,705,061	30,865,387	4,132,251	26,733,136	22,072,357	2,975,212	19,097,145
5.	Total above costs (excludes taxes)	$94,683,531	$14,720,567	$79,962,964	$93,646,808	$14,373,669	$79,273,139	$76,044,477	$11,992,730	$64,051,747
6.	Revenue net ton miles (thousands)	10,127,254	2,047,256	8,079,998	10,150,710	1,764,279	8,386,431	8,720,584	1,587,079	7,133,505
7.	Cost per 1000 revenue net ton miles	—	$ 7.190	$ 9.896	—	$ 8.147	$ 9.453	—	$ 7.556	$ 8.979
8.	Interstate revenue net ton miles (thousands)	—	1,973,643	7,507,658	—	1,682,481	7,793,726	—	1,511,323	6,597,216
9.	Cost of handling interstate traffic	—	$14,190,493	$74,295,784	—	$13,707,173	$73,674,092	—	$11,419,557	$59,236,402
10.	Interstate freight revenue—System	$89,393,748	—	—	$86,874,409	—	—	$72,621,900	—	—
11.	Division of interstate freight revenue on basis of cost	—	$14,338,757	$75,054,991	—	$13,630,595	$73,243,814	—	$11,735,699	$60,886,201
12.	Intrastate freight revenue—North Dakota	—	$ 1,289,150	—	—	$ 1,407,295	—	—	$ 1,238,744	—
13.	Total freight revenue—North Dakota	—	$15,627,907	—	—	$15,037,890	—	—	$12,974,443	—

		1931			1932			
		System	North Dakota	All Other	System	North Dakota	All Other	
1.	Freight operating expenses	$39,337,050	$ 7,001,679	$32,335,371	$32,252,839	$ 5,985,570	$26,267,269	Annual report to Railroad Commissioners of N. D.
2.	Hire of equipment—freight proportion—Dr.	1,423,921	293,136	1,130,785	1,452,661	301,361	1,151,300	Schedule C
3.	Joint facility rents—freight proportion	Dr. 347,867	Cr. 317	Dr. 348,184	Dr. 266,648	Cr. 249	Dr. 266,897	Schedule C
4.	Allowance for use of property based on I. C. C.'s cost of reproduction new, less depreciation, plus additions and betterments since valuation date—freight proportion	14,125,819	1,930,210	12,195,609	5,623,638	779,019	4,844,619	Schedule C
5.	Total above costs (excludes taxes)	$55,234,657	$ 9,224,708	$46,009,949	$39,595,786	$ 7,065,701	$32,530,085	Sum of Items 1 to 4 inclusive
6.	Revenue net ton miles (thousands)	6,151,063	1,168,971	4,982,092	4,324,700	910,222	3,414,478	Annual report to Railroad Commissioners of N. D.
7.	Cost per 1000 revenue net ton miles	—	$ 7.891	$ 9.235	—	$ 7.763	$ 9.527	Item 5 divided by Item 6
8.	Interstate revenue net ton miles (thousands)	—	1,100,533	4,544,064	—	835,212	3,125,147	Current records of Great Northern Ry. Co.
9.	Cost of handling interstate traffic	—	$ 8,684,306	$41,964,431	—	$ 6,483,751	$29,773,275	Item 7 multiplied by Item 8
10.	Interstate freight revenue—System	$52,656,707	—	—	$38,183,202	—	—	Current records of Great Northern Ry. Co. as reported to each State Railroad Commission
11.	Division of interstate freight revenue on basis of cost	—	$ 9,030,625	$43,626,082	—	$ 6,827,157	$31,356,045	Item 10 divided between North Dakota and all other on basis of cost of handling interstate traffic, Item 9
12.	Intrastate freight revenue—North Dakota	—	$ 1,019,373	—	—	$ 1,063,937	—	Annual report to Railroad Commissioners of N. D.
13.	Total freight revenue—North Dakota	—	$10,049,998	—	—	$ 7,891,094	—	Item 11 plus Item 12

308 Plaintiff's Exhibit 13

Great Northern Railway Company

Tons of Revenue Freight Originated Per Mile of Road

1930 — 1932

	State of North Dakota	Balance of System
Tons of Revenue Freight Originating:		
Year 1930	2,310,036	23,688,003
" 1931	1,602,244	13,575,836
" 1932	1,236,119	6,400,963
Average Miles of Road Freight Operated:		
Year 1930	1,917.90	6,420.70
" 1931	1,917.78	6,411.44
" 1932	1,917.41	6,463.18
Tons of Revenue Freight Originating per Mile of Road Freight Operated:		
Year 1930	1,204	3,689
" 1931	835	2,117
" 1932	645	990

Source—Annual Reports to North Dakota Board of Railroad Commissioners

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309 Plaintiff's Exhibit 14

Great Northern Railway Company

Net Ton Miles per Mile of Road.

1930 — 1932

	State of North Dakota	Balance of System
Ton Miles of Revenue Freight Carried:		
Year 1930	1,587,079,064	7,133,504,840
" 1931	1,168,970,768	4,982,092,631
" 1932	910,222,371	3,414,478,023
Average Miles of Road Freight Operated:		
Year 1930	1,917.90	6,420.70
" 1931	1,917.78	6,411.44
" 1932	1,917.41	6,463.18
Ton Miles of Revenue Freight Carried per Mile of Road Freight Operated:		
Year 1930	827,509	1,111,017
" 1931	609,544	777,063
" 1932	474,715	528,297

Source—Annual Reports to North Dakota Board of Railroad Commissioners.

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310 Plaintiff's Exhibit 15

Great Northern Railway Company

Freight Revenue Per Revenue Net Ton Mile on Intrastate Traffic

State	Year 1932 (cents)	Year 1933 (cents)
Minnesota	2.388	2.442
Wisconsin	13.556	4.713
South Dakota	2.751	4.645
Iowa	3.280	3.231
North Dakota	1.418	1.248
Montana	2.368	1.954
Idaho	5.024	1.747
Washington	2.205	1.880
Oregon	1.887	1.063
California	7.328	2.509
System	2.134	1.881

311 Plaintiff's Exhibit 16

Great Northern Railway Company

Capitalization of Net Railway Operating Income

Year	Net Railway Operating Income
1928	$31,294,069
1929	32,457,524
1930	21,912,508
1931	12,669,420
1932	1,290,551
1933	11,810,227

Capitalization of Average Net Railway Operating Income

Period	Rate 6%	7%	8%
1928 — 1932 (5 years)	$332,080,233	$284,640,200	$249,060,175
1930 — 1932 (3 years)	199,291,550	170,821,329	149,468,663
1932 (1 year)	21,509,183	18,436,443	16,131,888

312 Plaintiff's Exhibit 17

Great Northern Railway Company

Yield to Maturity on Bonds Based on Average Market Prices, 1932 and 1933.

Yield to Maturity on Outstanding Bonds:

1932 — 10.72%

1933 — 11.23%

313

Plaintiff's Exhibit 18

Great Northern Railway Company

Year (1)	Net Railway Operating Income (2)	Net Income Other Properties and Securities (3)	Total (4)=2÷3	Ratio Column 2 to Column 4 (5)=2÷4
1928	$31,294,069	$12,410,183	$43,704,252	71.60%
1929	32,457,524	11,473,547	43,931,071	73.88
1930	21,912,508	14,802,491	36,714,999	59.68
1931	12,669,420	11,552,886	24,222,306	52.30
1932	1,290,551	4,560,363	5,850,914	22.06
Avg. 1928-1932	19,924,814	10,959,894	30,884,708	64.51

Average Market Value of Stocks and Bonds

Period (1)	Stocks (2)	Bonds (3)	Total (4)=2÷3	Separate Value of Railroad Property Based on Percent of Income (5)	Separate Value of Railroad Property Based on appraisal of non-operating amounts from Exhibit 2 (6)
Avg. 1930-32 (3 yrs)	$116,566,411	$326,580,395	$443,146,806	$238,014,150	$260,910,990
" 1931-32 (2 ")	72,660,382	306,412,732	379,073,114	175,965,740	196,837,298
1932	32,830,915	263,470,262	296,301,177	65,364,040	114,065,361
1933	44,016,245	261,693,630	305,709,875		
1934 to Sept. 15	55,206,816	323,129,716	378,336,532		

314

Plaintiff's Exhibit 19

Great Northern Railway Company

Assignment of System Value to North Dakota

	System Value	Percentage Applicable to North Dakota	North Dakota Proportion
1. Average 1930-1932 earnings capitalized at 7%	$170,821,329		
2. Average stock and bond value, 1930-1932—railway income proportion	238,014,150		
3. Average of lines 1 and 2	204,417,740		
4. 11.71% allocated to North Dakota—1930-1932 (Exhibit)		11.71	$23,937,317
Allocation Rates Advocated by Defendant:			
(a) Mileage all tracks (Dec. 31, 1932)		19.96%	
(b) Car and locomotive mileage (5 yr. average)		20.04	
(c) Revenue traffic units (5 yr. average)		18.93	
(d) Gross operating revenues (5 yr. average with mileage pro-rate of through revenue)		18.45	
(e) Physical property (cost of reproduction new, less depreciation)		13.85	
5. Average lines (a) to (e) inclusive		18.25	
6. Allocation to North Dakota 18.25 (line 5) of line (3)		18.25	$37,306,238
7. Highest value on Exhibit	$332,080,233		
8. Highest value on Exhibit	260,910,990		
9. Average of lines 7 and 8	296,495,612		
10. 11.71% (Exhibit) of line 9 allocated to N. D.		11.71	$34,719,636
11. 18.25% (line 5) of line 9 allocated to N. D.		18.25	54,110,449
12. Assessed valuation, North Dakota 1933			$78,832,888

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Plaintiff's Exhibit 20

Great Northern Railway Company

Net Railway Operating Income

		Average Net Railway Operating Income	Per Cent Decrease
1.	Average 1927–1931 (5 years)	$25,507,212	
2.	Average 1928–1932 (5 years)	19,924,814	
3.	Per Cent decrease		21.89%
4.	Average 1929–1931 (3 years)	22,346,484	
5.	Average 1930–1932 (3 years)	11,957,493	
6.	Per Cent decrease		46.49
7.	Year 1931	12,669,420	
8.	Year 1932	1,290,551	
9.	Per Cent decrease		89.81
10.	Average of above per cents (lines 3, 6 and 9)		52.73%

Average Market Price of Stocks and Bonds Attributable To Railway Property by Method Shown in Exhibit 6

		Average Market Price of Stocks and Bonds	Assessed Valuation	Per Cent Decrease
11.	Average 1929–1931 (3 years)	$350,073,364		
12.	Average 1930–1932 (3 years)	238,014,150		
13.	Per Cent decrease			32.01%
14.	Average 1930–1931 (2 years)	293,153,260		
15.	Average 1931–1932 (2 years)	175,965,740		
16.	Per Cent decrease			39.97
17.	Year 1931	241,544,962		
18.	Year 1932	65,364,040		
19.	Per Cent decrease			72.94
20.	Average of above per cents (lines 13, 16 and 19)			48.31%
21.	Average of lines 10 and 20			50.52%
22.	1932 Assessed valuation North Dakota		$78,849,997	
23.	1933 Assessed valuation North Dakota		78,832,888	
24.	Per Cent decrease			0.02%

316 Plaintiff's Exhibit 21

Comparison of Assessed Value in North Dakota with Proportion of System Value Assigned to North Dakota on Basis of Plaintiff's Exhibit 12
Calendar Years 1928 - 1932

Calendar Year	System Value as Determined in Defendant's Exhibit ... (1)	Rate of Allocation to North Dakota Plaintiff's Exhibit 12 (2)	Amount of System Value Assignable to North Dakota (3) = (1)x(2)	Actual Assessment in North Dakota Defendant's Exhibit ... (4)	Per Centage of over Assessment in North Dakota (5) = (4)-(3) ÷ (3)
1928	$437,789,980	12.82%	$56,124,675	$83,294,677	48.4%
1929	460,989,128	12.34%	56,886,058	83,294,688	46.4%
1930	455,777,674	11.91%	54,283,121	82,999,997	52.9%
1931	415,278,961	11.37%	47,217,218	78,850,024	67.0%
1932	345,188,820	11.77%	40,628,724	78,832,888	94.0%

317 Plaintiff's Exhibit 22

Great Northern Railway Company

Comparison of System Values on Different Bases and Variation in Percentages of System Value to be Assigned to North Dakota.

	Average for 3 years 1930 - 1932	Average for 4 years 1929 - 1932	Average for 5 years 1928 - 1932
System Value:			
1. Capitalization of net railway operating income			
(a) at 7%	$170,821,329	$244,035,729	$284,640,200
(b) at 6%	199,291,550	284,708,350	332,080,233
2. Stock and Bond Value with deduction for non-operating property			
(a) Based on 5 yrs income (36.71%)	280,467,616	306,808,851	322,236,814
(b) Based on composite income and asset ratio, defendant's Ex. I (30.29%)	308,917,641	337,930,874	354,923,815
3. Capitalization of prospective future normal net railway operating income of $14,000,000			
(a) at 7%	200,000,000	200,000,000	200,000,000
(b) at 6%	233,333,333	233,333,333	233,333,333
Assignment to North Dakota:			
4. Basis of net income before taxes Plaintiff's Ex. 12 for 5 years		12.22%	
5. Basis 5 factor per cents, Defendant's Ex. P, block 4, for 5 years		18.34%	

318 Plaintiff's Exhibit 23

Great Northern Railway Company

See Defendant's Exhibit U.

Comparison of Farm Income with the Assessed Valuation of Farm Real and Personal Property, 1928-1932.

Year	Gross income from farm production	Cash income from farm production	Assessment of farm real and personal property	Ratio of assessment to gross income	Ratio of assessment to cash income
1928	$249,585,000	$227,810,000	$909,468,343	364%	399%
1929	211,942,000	189,748,000	904,605,843	427	477
1930	147,931,000	129,184,000	903,526,834	611	699
1931	72,716,000	59,622,000	761,175,701	1047	1277
1932	71,364,000	60,626,000	745,671,817	1045	1230

Comparison of Great Northern Assessment with Net Operating Revenues in North Dakota for the Years 1928-1932

Year	Net operating revenues after taxes	Assessment	Ratio of assessment to net revenues
1928	$9,146,501	$82,266,386	899%
1929	6,628,548	83,294,677	1,257
1930	4,367,620	83,294,688	1,907
1931	2,131,043	82,999,997	3,895
1932	581,644	78,850,024	13,556

Per cent ratio of assessment to income 1932 compared with 1928 on basis of

(1) Gross income from farm production 287%

(2) Cash income from farm production 308%

(3) Net operating revenues after taxes Great Northern Ry. Co. 1508%

Note: Net operating revenues after taxes are gross operating revenues (assigning interstate on mileage prorate) less operating expenses and taxes not that revenues so assigned are accurate but merely for illustrative purposes

mufls & G.

Table - 2 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

STATEMENT SHOWING PAR VALUE OF CAPITAL STOCK AND FUNDED DEBT OF THE GREAT NORTHERN RAILWAY CO
AND AVERAGE QUOTATIONS AND MARKET VALUE FOR ONE YEAR AND FIVE YE

Description of Capital Stock and Funded Debt		Par value outstanding Dec. 31, 1932	Average ma year ended Average Quotations
Capital Stock			
Preferred		$ 248,719,050	$ 13.20
Bonds			
G.N.Ry. Co. - First & Refunding mtge.gold bonds	4½%	35,668,000	77.90
- General mtge. gold bonds, Series "B"	5½%	30,000,000	64.00
" " " " Series "C"	5 %	15,000,000	61.00
" " " " Series "D"	4½%	15,000,000	55.90
" " " " Series "E"	4½%	40,000,000	56.00
St.P. M. & M. Ry.Co. - Consolidated mtge bonds.	6 %	13,344,000	96.50
" " " "	4½%	20,797,000	93.80
" " " "	4 %	7,822,000	94.00
- Montana Extension mtge.bonds	4 %	10,185,000	85.00
- Pacific Extension mtg.bonds	4 %	28,383,515	75.30
East Ry. Co. of Minn - Nor.Div.1st mtge. bonds	4 %	9,695,000	80.20
Montana Central Ry. Co. - 1st mtge bonds	6 %	6,000,000	92.20
" " " " - 1st mtge. bonds	5 %	4,000,000	85.80
Wilmar & Sioux Falls Ry. Co. - 1st mtge. bonds	5 %	3,625,000	100.00*
Spokane Falls & Northern Ry. Co. - 1st mtge. bonds	6 %	229,000	100.00*
Equipment Obligations			
G.N.Ry. Co. - Equip. Trust.Series "B" Ser.Trs.Cert.	5 %	3,450,000	100.00*
" " " " "C" " " "	4½%	2,100,000	100.00*
" " " " "D" " " "	4½%	1,986,000	100.00
Total (Exclusive of Series "A" Gen.Mtge.Gold bonds)		$247,284,515	
G.N.Ry. Co. - General Mortgage gold bonds, Series "A"	7 %	105,859,000	74.30
TOTAL ALL BONDS		353,143,515	

Description of Capital Stock and Funded Debt		Outstanding Dec. 31, 1932	Average Quotations
Capital Stock			
Preferred		$ 248,719,050	$ 13.20
Bonds			
G.N.Ry. Co. - First & Refunding mtge.gold bonds	4½%	35,668,000	77.90
" - General mtge. gold bonds, Series "B"	5½%	30,000,000	64.00
" " " " Series "C"	5 %	15,000,000	61.00
" " " " Series "D"	4½%	15,000,000	55.90
" " " " Series "E"	4½%	40,000,000	56.00
St.P. M. & M. Ry.Co. - Consolidated mtge bonds.	6 %	13,344,000	96.50
" " " "	4½%	20,797,000	93.80
" " " "	4 %	7,822,000	94.00
" Montana Extension mtge.bonds	4 %	10,185,000	85.00
" Pacific Extension mtg.bonds	4 %	28,383,515	75.30
East Ry. Co. of Minn - Nor.Div.1st mtge. bonds	4 %	9,095,000	80.20
Montana Central Ry. Co. - 1st mtge bonds	6 %	6,000,000	92.20
" " " - 1st mtge. bonds	5 %	4,000,000	85.80
Wilmar & Sioux Falls Ry. Co. - 1st mtge. bonds	5 %	3,625,000	100.00*
Spokane Falls & Northern Ry. Co. - 1st mtge. bonds	6 %	229,000	100.00*
Equipment Obligations			
G.N.Ry. Co. - Equip. Trust.Series "B" Ser.Trs.Cert.	5 %	3,450,000	100.00*
" " " " "C" " " "	4½%	2,100,000	100.00*
" " " " "D" " " "	4½%	1,986,000	100.00
Total (Exclusive of Series "A" Gen.Mtge.Gold bonds)		$247,284,515	
G.N.Ry. Co. - General Mortgage gold bonds, Series "A"	7 %	105,859,000	74.30
TOTAL ALL BONDS		353,143,515	
TOTAL STOCKS AND BONDS (Exclusive of Series "A")		496,003,565	
TOTAL ALL STOCKS AND BONDS		$ 601,862,565	

* Par value as of December 31, 1932 shown, as market value not available.

SOURCE: 1933 annual report of the Great Northern Railway Company to the State Tax Commissioner of

NOTE: Great Northern Series "A" gold bonds were issued to refinance the Great Northern's proporti collateral Trust Bonds. By reason of the issue of these bonds ownership of 48.59% of the stoc vested in the Great Northern Railway Company. The bonds are primarily a lien on this stock pledge of the stock. The amount originally issued was $115,000,000. On December 31, 1927, $9 7% bonds were retired leaving outstanding $105,859,000.

Table - 2 - (L. A. Baker)

Defendants' Exhibit A.

GREAT NORTHERN RAILWAY COMPANY

FUNDED DEBT OF THE GREAT NORTHERN RAILWAY COMPANY IN THE HANDS OF THE PUBLIC DECEMBER 31, 1932
IS AND MARKET VALUE FOR ONE YEAR AND FIVE YEAR PERIOD ENDED DECEMBER 31, 1932

	Par value outstanding Dec. 31, 1932	Average market value for the year ended December 31, 1932		Average market value for the five year period ended December 31, 1932	
		Average Quotations	Total market value	Average Quotations	Total market value
	$ 248,719,050	$ 13.20	$ 32,830,915	$ 69.90	$ 173,854,616
4½%	35,668,000	77.90	27,785,372	92.90	33,135,572
5%	30,000,000	64.00	19,200,000	98.30	29,490 000
5 %	15,000,000	61.00	9,150,000	93.90	14,085,000
4½%	15,000,000	55.90	8,385,000	87.10	13,065,000
4½%	40,000,000	56.00	22,400,000	86.90	34,760,000
6 %	13,344 000	96.50	12,876,960	102.40	13,664,256
4½%	20,797,000	93.80	19,507,586	98.40	20,464,248
4 %	7,822,000	94.00	7,352 680	96.70	7,563,874
4 %	10,185,000	85.00	8,657,250	93.20	9,482,420
4 %	28,383,515	75.30	21,372,787	87.60	24,863,959
4 %	9,695,000	80.20	7,775,390	91.90	8,909,705
6 %	6,000,000	92.20	5,532,000	104.20	6,252 000
5 %	4,000,000	85.80	3,432,000	98.30	3,932,000
5 %	3,625,000	100.00*	3,625,000*	100.70	3,650,375
6 %	229,000	100.00*	229,000	100.00*	229,000
5 %	3,450,000	100.00*	3,450,000*	100.00	3,450,000*
4½%	2,100,000	100.00*	2,100,000*	100.00*	2,100,000*
4½%	1,986,000	100.00	1,986,000*	100.00*	1,986,000*
	$247,284,515		$ 184,817,025		$ 231,093,409
7 %	105,859,000	74.30	78,653,237	103.00	109,034,770
	353,143,515		263,470,262		340,128,179

	Outstanding Dec. 31, 1932	December 31, 1932 Average Quotations	Total market value	Average Quotations	Total market value
	$ 248,719,050	$ 13.20	$ 32,830,915	$ 69.90	$ 173,854,616
4½%	35,668,000	77.90	27,785,372	92.90	33,135,572
5½%	30,000,000	64.00	19,200,000	98.30	29,490 000
5 %	15,000,000	61.00	9,150,000	93.90	14,085,000
4½%	15,000,000	55.90	8,385,000	87.10	13,065,000
4½%	40,000,000	56.00	22,400,000	86.90	34,760,000
6 %	13,344 000	96.50	12,876,960	102.40	13,664,256
4½%	20,797,000	93.80	19,507,586	98.40	20,464,248
4 %	7,822,000	94.00	7,352,680	96.70	7,563,874
4 %	10,185,000	85.00	8,657,250	93.20	9,482,420
4 %	28,383,515	75.30	21,372,787	87.60	24,863,959
4 %	9,695,000	80.20	7,775,390	91.90	8,909,705
6 %	6,000,000	92.20	5,532,000	104.20	6,252 000
5 %	4,000,000	85.80	3,432,000	98.30	3,932,000
5 %	3,625,000	100.00*	3,625,000*	100.70	3,650,375
6 %	229,000	100.00*	229,000	100.00*	229,000
5 %	3,450,000	100.00*	3,450,000*	100.00	3,450,000*
4½%	2,100,000	100.00*	2,100,000*	100.00*	2,100,000*
4½%	1,986,000	100.00	1,986,000*	100.00*	1,986,000*
	$247,284,515		$ 184,817,025		$ 231 093 409
7 %	105,859,000	74.30	78 653,237	103 00	109,034 770
	353,143,515		263,470 262		340,128,179
	496,003,565		217,647,940		404,948,025
	$ 601,862,565		$ 296,301,177		$ 513,982,795

lue not available.
y Company to the State Tax Commissioner of North Dakota.

to refinance the Great Northern's proportion of the Burlington-Northern Pacific-Great Northern these bonds ownership of 48.59% of the stock of the Chicago, Burlington and Quincy Railway Company is bonds are primarily a lien on this stock were issued to purchase said stock and are secured by the ms $115,000,000. O. December 31 1927, $9,141,000 principal amount of General mortgage series "A" 00.

draft E & B
B. M.

Table - 3 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

AVERAGE MARKET VALUE OF STOCKS AND BONDS FOR THE YEARS 1924 to 1932, ALSO FOR THE FIVE YEAR
1929, 1930, 1931 AND 1932.

Year ended December 31,	Par Value all stocks and bonds outstanding	Average market value of: Capital Stock	Bonds - excluding Series "A" General Mortgage gold bonds	Total stocks and bonds - excluding Series "A" General Mortgage Gold Bonds	Series "A" ... Gold bonds (Bu... bonds) (1)
1924	$ 545,559,965	$ 153,428,447	$190,749,640	$344,178,087	$ 124,775
1925	567,783,065	174,739,418	197,001,995	371,741,413	126,500
1926	581,250,165	188,443,757	213,789,018	402,232,775	130,065
1927	590,596,155	231,041,608	238,257,866	469,299,474	121,208
1928	589,087,265	250,747,683	235,540,461	486,288,144	120,361
1929	585,798,965	269,146,785	224,352,323	493,499,109	116,127
1930	604,498,965	204,378,467	249,200,515	453,578,982	117,715
1931	603,172,865	112,489,850	237,038,802	349,528,652	112,316
1932	601,862,565	32,830,915	184,817,025	217,647,940	78,653
5 year period ended December 31.					
1926	581,250,165	175,748,075	208,139,424	383,887,499	126,270
1927	590,596,165	181,995,060	229,432,137	411,427,197	117,185
1928	589,087,265	199,701,729	230,537,619	430,239,348	118,495
1929	585,798,965	222,836,608	228,020,719	450,857,327	118,775
1930	604,498,965	228,774,436	247,886,991	476,661,427	118,985
1931	603,172,865	213,531,618	245,280,061	458,811,679	117,503
1932	601,862,565	173,854,616	231,093,409	404,948,025	109,054

(1) Bonds issued to purchase Burlington stock and secured by a pledge of such stock.

Year ended December 31,	Par Value all stocks and bonds outstanding	Average market value of: Capital Stock	Bonds - excluding Series "A" General mortgage gold bonds	Total stocks and bonds - excluding Series "A" General Mortgage Gold Bonds	Series "A" (mtge. Gold bonds (Burl: bonds) (1)
1924	$ 545,559,965	$ 153,428,447	$190,749,640	$344,178,087	$ 124,775,0
1925	567,783,065	174,739,418	197,001,995	371,741,413	126,500,0
1926	581,250,165	188,443,757	213,789,018	402,232,775	130,065,0
1927	590,596,155	231,041,608	238,257,866	469,299,474	121,208,5
1928	589,087,265	250,747,683	235,540,461	486,288,144	120,361,6
1929	585,798,965	269,146,785	224,352,323	493,499,108	116,127,3
1930	604,498,965	204,378,467	249,200,515	453,578,982	117,715,2
1931	603,172,865	112,489,850	237,038,802	349,528,652	112,316,3
1932	601,862,565	32,830,915	184,817,025	217,647,940	78,653,2
5 year period ended December 31.					
1926	581,250,165	175,748,075	208,139,424	383,887,499	126,270,0
1927	590,596,165	181,995,060	229,432,137	411,427,197	117,185,9
1928	589,087,265	199,701,729	230,537,619	430,239,348	118,456,2
1929	585,798,965	222,836,608	228,020,719	450,857,327	118,773,7
1930	604,498,965	228,774,436	247,886,991	476,661,427	118,985,5
1931	603,172,865	213,531,618	245,280,061	458,811,679	117,503,4
1932	601,862,565	175,854,616	231,093,409	404,948,025	109,034,7

(1) Bonds issued to purchase Burlington stock and secured by a pledge of such stock.

Source: Annual reports and special reports of the Great Northern Railway Company to the State Tax I

Defendants' Exhibit B.

Table - 3 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

THE YEARS 1924 to 1932, ALSO FOR THE FIVE YEAR PERIODS ENDING DECEMBER 31, 1926, 1927, 1928, 1929, 1930, 1931 AND 1932.

Average market value of:				Increase (I) or Decrease (D) compared with previous year's total stock and bond value
Bonds - luding Series General tgage gold ds	Total stocks and bonds - excluding Series "A" General Mortgage Gold Bonds	Series "A" Gen. ...tge. Gold bonds (Burlington bonds) (1)	All Stocks and Bonds	
190,749,640	$344,178,087	$ 124,775,000	$ 468,953,087	---------
197,001,995	371,741,413	126,500,000	498,241,413	I 6.25%
213,789,018	402,232,775	130,065,000	532,297,775	I 6.84
238,257,866	469,299,474	121,208,555	590,508,029	I 10.94
235,540,461	486,288,144	120,361,683	606,649,827	I 2.73
224,352,323	493,499,108	116,127,323	609,626,431	I 0.49
249,200,515	453,578,982	117,715,208	571,294,190	D 6.29
237,038,802	349,528,652	112,316,399	461,845,051	D 19.16
184,817,025	217,647,940	78,653,237	296,301,177	D 35.84
208,139,424	383,887,499	126,270,000	510,157,499	---------
229,432,137	411,427,197	117,185,913	528,613,110	I 3.62
230,537,619	430,239,348	118,456,221	548,695,569	I 3.80
238,020,719	450,857,327	118,773,798	569,631,125	I 3.82
247,886,991	476,661,427	118,985,516	595,646,943	I 4.57
245,280,061	458,811,679	117,503,490	576,315,169	D 3.25
231,093,409	404,948,025	109,034,770	513,982,795	D 10.82

(1) ...cured by a pledge of such stock.

Average market value of:				Increase (I) or Decrease (D) compared with previous year's total stock and bond value
Bonds - uding Series General gage gold s	Total stocks and bonds - excluding Series "A" General Mortgage Gold Bonds	Series "A" General Mortgage Gold bonds (Burlington bonds) (1)	All Stocks and Bonds	
90,749,640	$344,178,087	$ 124,775,000	$ 468,953,087	----------
97,001,995	371,741,413	126,500,000	498,241,413	I 6.25%
13,789,018	402,232,775	130,065,000	532,297,775	I 6.84
38,257,866	469,299,474	121,208,555	590,508,029	I 10.94
35,540,461	486,288,144	120,361,683	606,649,827	I 2.73
24,352,323	493,499,108	116,127,323	609,626,431	I 0.49
49,200,515	453,578,982	117,715,208	571,294,190	D 6.29
37,038,802	349,525,652	112,316,399	461,845,051	D 19.16
84,817,025	217,647,940	78,653,237	296,301,177	D 35.84
08,139,424	383,887,499	126,270,000	510,157,499	----------
29,432,137	411,427,197	117,185,913	528,613,110	I 3.62
30,537,619	430,239,348	118,456,221	548,695,569	I 3.80
3,020,719	450,857,327	118,773,798	569,631,125	I 3.82
17,886,991	476,661,427	118,985,516	595,646,943	I 4.57
15,280,061	458,811,679	117,503,490	576,315,169	D 3.25
11,093,409	404,948,025	109,034,770	513,982,795	D 10.82

ured by a pledge of such stock.

eat Northern Railway Company to the State Tax Department of North Dakota.

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Defts. Ex. C
B. M.

Table — 4 — (L. A. Baker)

Great Northern Railway Company

Average Quotations on Stock, 1916–1932, Earnings Record and Dividend Record, 1916–1932 and Corporate Surplus at End of Years 1916–1932 Inclusive.

Year ended December 31	Average market quotations	Earned per share on capital Stock	Dividends declared		Corporate surplus at end of year
			Per share	Total	
1916	$ 121.25	$ 9.74	$ 7.00	$17,459,449	$106,511,552
1917	98.75	9.23	7.00	17,462,959	116,968,997
1918	96.25	7.53	7.00	17,462,842	114,936,578
1919	87.87	8.88	7.00	17,462,890	119,851,064
1920	78.56	7.74	7.00	17,462,916	122,749,921
1921	69.63	11.41	7.00	17,462,973	129,371,797
1922	80.70	4.36	5.25	13,097,264	129,371,798
1923	65.00	7.24	5.00	12,473,605	126,347,164
1924	61.50	7.19	5.00	12,473,617	132,134,125
1925	70.20	8.61	5.00	12,369,145	140,564,902
1926	75.70	10.42	5.00	12,445,855	154,439,241
1927	92.80	9.23	5.00	12,447,355	154,389,752
1928	100.70	10.11	5.00	12,449,205	162,499,526
1929	108.10	10.31	5.00	12,450,225	165,685,738
1930	82.10	7.25	7.50	18,673,035	164,905,196
1931	45.20	2.14	2.50	6,222,716	163,978,163
1932	13.20	Nil	.....	.....	149,260,003
Totals		$ 131.39	$92.25	$229,876,051	

Note: Authorized capital stock 2,500,000 shares, par value $100. or a total of $250,000,000. Amount issued to December 31, 1932 was $249,748,350 and amount in hands of the public was $248,719,050. The amount in hands of public has varied but little during period 1916–1932.

Source: Annual reports of Great Northern, 1922 to 1932. Moody's Investment Manual for prior years.

Table -6- (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

STATEMENT SHOWING THE GROSS RECEIPTS, THE COST OF OPERATION AND THE INCOME RESULTING FROM OP

Year	Total operating income	Operating expenses	Net railway operating revenue	Taxes	Uncollectible	Net
1922	$ 143,452,937	$ 79,636,038	$ 23,816,899	$ 8,097,725	$ 15,874	$15,7
1923	120,077,771	86,730,523	33,347,248	9,113,227	20,382	24,1
1924	118,24[illegible],104	75,212,058	33,031,046	10,251,741	12,007	24,7
1925	114,924,960	75,827,288	39,097,672	9,801,946	7,944	29,8
1926	117,383,909	75,285,464	42,098,445	9,699,607	15,338	32,3
1927	117,904,005	78,358,580	39,548,425	9,046,049	238 Cr.	30,2
1928	126,737,091	83,235,116	43,501,975	10,297,997	13,916	33,1
1929	125,932,808	82,862,910	43,069,898	9,801,154	17,181	33,8
1930	[illegible]	[illegible]	[illegible]	8,712,598	[illegible]	27,7
1931	77,067,454	55,285,953	21,601,501	7,179,028	9,894	14,6
1932	55,549,247	45,655,673	9,893,574	6,697,424	14,[illegible]	3,1
Totals	$1,174,889,362	$ 810,672,481	$363,616,881	$ 98,104,696	$136,784 Dr.	$265,

STATEMENT SHOWING NET RAILWAY OPERATING INCOME, NONOPERATING INCOME, INCOME DEDUC
FOR THE ELEVEN YEAR PERIOD ENDING DECEMBER 31, 19[illegible]

Year	Net railway operating income	Nonoperating income	Gross income	Interest deductions on funded debt
1922	$ 17,276,598	$ 10,487,006	$ 27,763,604	$ 16,842,953
1923	24,731,992	5,085,539	29,817,531	16,348,339
1924	24,281,287	11,653,877	35,935,164	17,187,197
1925	28,276,183	11,428,248	39,704,431	17,591,927
1926	31,880,429	13,175,670	44,456,099	17,911,341
1927	29,[illegible],548	12,[illegible],273	42,048,813	18,349,499
1928	31,894,849	13,032,123	44,326,198	18,597,673
1929	32,457,523	12,026,227	44,483,750	18,220,132

1922	$ 143,482,937	$ 79,636,038	$ 23,816,899	$ [illegible]	$ [illegible]	[illegible]
1923	120,077,771	86,790,583	23,267,[illegible]	[illegible]	[illegible]	[illegible]
1924	118,21[illegible],104	73,212,[illegible]	25,[illegible]	[illegible]	[illegible]	[illegible]
1925	114,924,960	75,827,288	39,097,672	[illegible]	[illegible]	[illegible]
1926	117,383,909	73,285,464	42,098,445	9,692,697	[illegible]	[illegible]
1927	117,504,005	78,155,580	39,548,425	9,046,849	[illegible]	[illegible]
1928	126,737,091	83,235,116	43,501,975	10,297,977	13,[illegible]	[illegible]
1929	125,932,808	82,862,918	43,069,[illegible]	9,881,154	17,161	[illegible]
1930	104,996,976	72,565,878	32,430,198	8,712,598	[illegible]	[illegible]
1931	77,087,434	55,285,953	21,801,501	7,179,028	9,894	[illegible]
1932	55,549,247	45,655,673	9,[illegible],574	6,697,424	14,[illegible]	[illegible]
Totals	$1,174,889,362	$ 810,672,481	$363,616,881	$ 98,104,696	$136,784	[illegible]

STATEMENT SHOWING NET RAILWAY OPERATING INCOME, NONOPERATING INCOME, INCOME DEDUCT
FOR THE ELEVEN YEAR PERIOD ENDING DECEMBER 31, 193[illegible]

Year	Net railway operating income	Nonoperating income	Gross income	Interest deductions
1922	$ 17,276,598	$ 10,487,006	$ 27,763,604	$ 16,242,953
1923	24,731,992	5,085,539	29,817,531	16,348,339
1924	24,261,287	11,653,877	35,855,164	17,187,797
1925	28,276,183	11,428,248	39,704,431	17,591,987
1926	31,280,429	13,173,670	44,456,099	17,971,341
1927	29,[illegible],[illegible]	12,[illegible],273	42,[illegible],813	18,349,499
1928	31,894,869	13,032,123	44,926,192	18,397,673
1929	32,467,523	12,[illegible],227	44,483,750	18,220,132
1930	21,[illegible],508	15,528,317	37,440,825	18,641,072
1931	12,[illegible],[illegible]	12,110,637	24,780,057	18,992,022
1932	1,[illegible],551	5,096,[illegible]	6,386,643	18,933,207
Totals	$254,593,180	$122,462,[illegible]	$377,[illegible],109	$196,835,962

Source: Annual or special reports of the Great Northern Railway Company to State Tax C

Defendants' Exhibit D.

Table -6- (L. A. Baker).

GREAT NORTHERN RAILWAY COMPANY

OPERATION AND NET INCOME RESULTING FROM OPERATION FOR THE ELEVEN YEARS ENDED DECEMBER 31, 1932

...ing	Taxes	Uncollectible ... expenses	Railway operating income	Hire of equipment (net balance)	Joint facility rents (net balance)	Net railway operating income
895	$4,897,725	$ 15,574	$15,703,640	$1,739,083 Cr.	$226,065 Dr.	$ 17,276,598
248	9,113,227	20,982	24,193,039	806,631 Cr.	267,679 Dr.	24,731,992
846	10,891,741	12,867	24,761,038	304,289 Dr.	255,482 Dr.	24,201,287
672	9,801,946	7,844	29,287,862	726,135 Dr.	285,564 Dr.	28,276,183
445	9,699,607	15,339	32,383,899	808,498 Dr.	294,772 Dr.	31,280,429
485	9,046,849	228 Cr.	30,602,604	994,896 Dr.	302,168 Dr.	29,208,540
973	10,297,997	13,916	33,190,862	1,517,997 Dr	377,996 Dr.	31,294,869
898	9,801,154	17,181	33,851,563	991,449 Dr.	408,591 Dr.	32,457,523
198	8,712,598	9,845	23,707,755	1,347,804 Dr.	447,443 Dr.	21,912,508
581	7,179,028	2,894	14,612,579	1,454,238 Dr.	486,921 Dr.	12,669,420
574	6,697,424	14,8	3,181,940	1,513,915 Dr.	377,474 Dr.	1,290,551
881	$ 98,104,696	$136,764 Dr.	$265,375,401	$7,053,547 Dr.	$3,728,755 Dr.	$254,593,100

INCOME, NONOPERATING INCOME, INCOME DEDUCTIONS AND NET CORPORATE INCOME OR DEFICIT
ELEVEN YEAR PERIOD ENDING DECEMBER 31, 1932

Gross income	Interest deductions on funded debt	Other deductions	Net income
$ 27,763,604	$ 16,242,953	$654,979	$10,865,672
29,817,811	16,348,539	628,966	12,840,226
35,828,184	17,187,797	725,767	17,941,600
39,704,431	17,591,927	677,108	21,435,396
44,456,029	17,931,341	581,981	25,943,857
42,049,811	18,349,499	705,391	22,995,923
44,326,192	18,397,673	760,890	25,168,229

,895	$ 4,697,725	$ 15,534	$15,703,640	$1,799,023 Cr.	$226,065 Dr.	$ 17,276,598
,848	9,113,227	20,962	24,193,039	806,631 Cr.	267,679 Dr.	24,731,992
,846	10,291,741	12,867	24,761,038	304,269 Dr.	253,482 Dr.	24,801,287
,672	9,801,946	7,844	29,287,882	726,135 Dr.	285,564 Dr.	28,276,183
,445	9,699,607	15,339	32,383,299	808,498 Dr.	294,372 Dr.	31,280,429
,425	9,046,049	228 Cr.	30,502,604	994,896 Dr.	305,168 Dr.	29,202,540
,973	10,297,997	13,916	33,190,062	1,517,997 Dr	377,996 Dr.	31,294,069
,898	9,201,154	17,181	33,851,563	991,449 Dr.	402,391 Dr.	32,457,523
,198	8,712,598	9,845	23,707,755	1,347,804 Dr.	447,443 Dr.	21,912,508
,501	7,179,028	9,894	14,612,579	1,454,238 Dr.	488,921 Dr.	12,669,420
,574	6,697,424	14,?	3,181,940	1,513,915 Dr.	377,474 Dr.	1,290,551
,881	$ 98,104,696	$136,784 Dr.	$265,375,401	$7,053,547 Dr.	$3,728,755 Dr.	$254,593,100

INCOME, NONOPERATING INCOME, INCOME DEDUCTIONS AND NET CORPORATE INCOME OR DEFICIT
ELEVEN YEAR PERIOD ENDING DECEMBER 31, 1932

Gross income	Interest deductions on funded debt	Other deductions	Net income
$ 27,763,604	$ 16,242,953	$654,979	$10,865,672
29,817,531	16,348,339	628,966	12,840,226
35,855,164	17,187,797	725,767	17,941,600
39,704,431	17,591,927	677,108	21,435,396
44,456,099	17,931,341	581,501	25,943,257
42,040,813	18,349,499	705,391	22,985,923
44,326,192	18,397,673	760,290	25,168,229
44,483,750	18,220,132	595,067	25,668,551
37,440,825	18,841,072	763,005	18,036,748
24,780,057	18,992,022	462,128	5,325,907
6,386,643	18,933,207	858,875	13,405,439(Deficit)
$377,055,109	$196,835,962	$7,413,077	$172,806,070

...st Northern Railway Company to State Tax Commissioner.

323 Defts. Ex. E

B. M.

Table — 7 — (L. A. Baker)

Valuation of Great Northern Railway Property in 1929, 1930, 1931, 1932 and 1933 as Reflected by Capitalization of Company's Net Railway Operating Income for Five Year Periods Preceding The Assessment Year.

Five year period preceding assessment	Average net railway operating income for five year period	Average net railway operating income capitalized at 6%	Average net railway operating income capitalized at 5%
1929	$ 28,850,902	$ 480,848,367	$ 577,018,040
1930	30,502,149	508,369,150	610,042,980
1931	29,229,414	487,156,900	584,588,280
1932	25,507,212	425,120,200	510,144,240
1933	19,924,814	332,080,233	398,496,280

Source: Derived from reports of the company to Tax Commissioner of North Dakota.

Schedule Showing Rate Earned on Average Market Price of Stocks and Bonds for The Years 1928 – 1932

Year	Stock and Bond value	Gross income	Ratio
1928	$ 606,649,827	$44,326,192	7.31%
1929	609,626,431	44,483,750	7.30
1930	571,294,190	37,440,825	6.55
1931	461,845,051	24,780,057	5.37
1932	296,301,177	6,386,643	2.16

Table 8 (L. A. Baker

GREAT NORTHERN RAILWAY COMPANY

STATEMENT SHOWING COMPARATIVE INVESTMENT IN OPERATING AND NONOPERATING PROPERTY AT

Schedule 1.

Statement showing comparative investment in operating and nonoperating pr
to 1932 inclusive, as reported in annual reports to stockholders in which
companies operated as a part of the Great Northern system are reported un
ating property.

End of year	OPERATING PROPERTY		NONOPERATING PROPERTY		
	Road and Equipment (1)	Stocks	Bonds	Other securities	Ot prop
1926	$ 480,883,384	$193,070,054	$28,957,930	$26,134,420	$5,454,
1927	494,491,314	186,246,255	28,983,212	30,675,670	3,482,
1928	524,046,086	172,633,296	28,985,212	33,411,641	3,692,
1929	519,814,755	171,307,566	29,100,507	40,962,949	3,904,
1930	527,200,562	172,022,164	29,051,507	44,449,083	4,205,
1931	535,080,940	172,931,659	31,237,886	49,556,383	4,270,
1932	535,850,784	173,000,759	27,349,246	49,912,286(3)	4,330,

Schedule 2.

Statement showing comparative investment in operating and nonoperating p
1926 to 1932 inclusive, with wholly owned subsidiary companies operated as a
included under operating property.

End of year	Road and Equipment	NONOPERATING CAPITAL ASSETS		
		Locally assessed real estate (3)	Other property	Total
1926	$ 524,730,804	$ 8,300,000	$ 201,469,060	$ 209,769,060
1927	538,423,754	8,300,000	197,155,628	205,456,628
1928	559,263,851	8,300,000	195,204,920	203,504,920
1929	561,905,980	8,300,000	194,884,790	203,184,790
1930	571,918,242	8,291,335	196,718,847	205,000,182
1931	580,715,630	8,306,850	204,054,512	212,361,362
				207,198,876

Statement showing comparative investment in operating [illegible] to 1932 inclusive, as reported in annual reports to stockholders in which companies operated as a part of the Great Northern system are reported [illegible] ating property.

End of year	OPERATING PROPERTY: Road and Equipment (1)	Stocks	Bonds	NONOPERATING PROPERTY: Other securities	[illegible]
1926	$ 480,883,384	$193,070,054	$28,957,930	$26,134,420	$5,454
1927	494,491,314	186,246,255	28,983,212	30,675,670	3,482
1928	524,046,086	172,633,296	28,985,212	33,411,641	3,692
1929	519,814,755	171,307,566	29,100,507	40,962,949	3,904
1930	527,200,562	172,022,164	29,051,507	44,449,083	4,205
1931	535,080,940	172,931,659	31,237,886	49,556,383	4,270
1932	535,850,784	173,000,759	27,349,246	49,912,286(3)	4,330

Schedule 2.

Statement showing comparative investment in operating and nonoperating 1926 to 1932 inclusive, with wholly owned subsidiary companies operated as a included under operating property.

End of year	Road and Equipment	NONOPERATING CAPITAL ASSETS: Locally assessed real estate (3)	Other property	Total
1926	$ 524,730,804	$ 8,300,000	$ 201,469,060	$ 209,769,060
1927	538,423,754	8,300,000	197,155,628	205,455,628
1928	559,263,851	8,300,000	195,204,920	203,504,920
1929	561,905,980	8,300,000	194,884,790	203,184,790
1930	571,918,242	8,291,335	196,718,847	205,000,182
1931	580,715,630	8,306,850	204,054,512	212,361,362
1932	583,244,949	6,500,000	200,698,876	207,198,876

(1) Amounts invested in wholly owned subsidiary companies operated as a part of the Gre property in Schedule 1, and with operating property in Schedule 2.
(2) Included under head of other securities are notes, and advances to other companies. $3,576,039 and advances amounted to $45,219,649 (Schedule 1.)
(3) Carried on books of company under "Investment in Road and Equipment" but is locally
NOTE: Schedule 1 shows the general nature of nonoperating assets and Schedule 2 is int compute theshare of stock and bond values assignable to nonoperating property on t

Source: General Balance sheets in reports to stockholders and from annual reports to T

Defendants' Exhibit F.

Table 8 (L. A. Baker

GREAT NORTHERN RAILWAY COMPANY

IN OPERATING AND NONOPERATING PROPERTY AT END OF YEARS 1926 TO 1932 INCLUSIVE

Schedule 1.

investment in operating and nonoperating property at end of years 1926
in annual reports to stockholders in which wholly owned subsidiary
f the Great Northern system are reported under investments in nonoper-

NONOPERATING PROPERTY				
Bonds	Other securities	Other property	Total (2)	Total investment in all property
$28,957,930	$26,134,420	$5,454,075	$253,616,478	$ 734,499,863
28,983,212	30,675,670	3,482,931	249,388,068	743,879,382
28,985,212	33,411,641	3,692,535	248,722,684	762,768,770
29,100,507	40,962,949	3,904,992	245,276,014	765,090,769
29,051,507	44,449,083	4,205,108	249,727,862	776,928,424
31,237,886	49,556,383	4,270,124	257,996,852	793,076,992
27,349,246	49,912,286(3)	4,330,751	254,593,042	790,443,826

Schedule 2.

investment in operating and nonoperating property at end of years
owned subsidiary companies operated as a part of the Great Northern System
luded under operating property.

NONOPERATING CAPITAL ASSETS		Total Capital assets	Ratio of nonoperating assets to total
Other property	Total		
$ 201,469,060	$ 209,769,060	$734,499,864	27.43
197,155,628	205,455,628	743,879,382	27.62
195,204,980	203,504,920	762,768,771	26.68
194,884,790	203,184,790	765,090,770	26.56
196,718,847	205,000,182	776,928,424	26.39
204,654,512	212,361,362	793,076,992	26.78
[illegible]	207,198,876	790,443,825	26.21

in annual reports to stockholders in which wholly owned subsidiary
f the Great Northern system are reported under investments in nonoper-

NONOPERATING PROPERTY				Total investment in all property
Bonds	Other securities	Other property	Total (2)	
$28,957,930	$26,134,420	$5,454,075	$253,616,478	$ 734,499,863
28,983,212	30,675,670	3,482,931	249,388,068	743,879,382
28,985,212	33,411,641	3,692,535	248,722,684	762,768,770
29,100,507	40,962,949	3,904,992	245,276,014	765,090,769
29,051,507	44,449,083	4,205,108	249,727,862	776,928,424
31,237,886	49,556,383	4,270,124	257,996,052	793,076,992
27,349,246	49,912,286(3)	4,330,751	254,593,042	790,443,826

Schedule 2.

investment in operating and nonoperating property at end of years
owned subsidiary companies operated as a part of the Great Northern System
luded under operating property.

NONOPERATING CAPITAL ASSETS			Ratio of nonoperating assets to total
Other property	Total	Total Capital assets	
$ 201,469,060	$ 209,769,060	$734,499,864	27.43%
197,155,628	205,455,628	743,879,382	27.62
195,204,920	203,504,920	762,768,771	26.68
194,884,790	203,184,790	765,090,770	26.56
196,718,847	205,000,182	776,928,424	26.39
204,654,512	212,361,762	793,076,992	26.78
200,698,876	207,198,876	790,443,825	26.21

y companies operated as a part of the Great Northern system are included with nonoperating
property in Schedule 2.
e notes, and advances to other companies. As of December 31, 1932 notes amounted to
,649 (Schedule 1.)
nt in Road and Equipment" but is locally assessed the same as other real estate.
nonoperating assets and Schedule 2 is intended to present the basic figures necessary to
assignable to nonoperating property on the basis of relative investment.

tockholders and from annual reports to Tax Commissioner of North Dakota.

Table 9 -- (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

STATEMENT SHOWING THE NONOPERATING INCOME FOR THE GREAT NORTHERN RAILWAY COMPANY FROM V

Year ended Dec. 31	SOURCE OF INCOME				
	Income from lease of road	Miscellaneous rent income	Miscellaneous nonoperating physical property	Dividend income	Income from funded securities
1923	$ 1,458.58	$ 512,659.19	$ 58 025.59	$ 8,403,519.37	$ 552,287.05
1924	35,542.66	508,119.18	24,666.19	9,287,584.26	1,137,522.8
1925	4,581.88	590,913.88	69,917.22	9,310,874.63	807,706.3
1926	1,727.52	502,631.23	101,096.28	9,472,726.99	2,316,394.0
1927	1,581.27	630,518.15	69,318.09	9,663,282.95	1,311,274.0
1928	1,497.52	658,961.48	163,913.48	9,771,836.46	872,[illegible]
1929	1,427.52	687,719.87	189,317.69	9,363,567.09	985,259.8
1930	1,427.52	672,612.32	190,530.97	13,285,672.32	554,376.5
1931	1,427.52	667,282.57	166,934.36	9,201,614.76	1,151,748.3
1932	777.36	650,235.08	165,314.98	3,047,898.44	656,305.9
Totals	$51,449.35	$6,081,652.95	$ 1,159,034.85	$90,808,577.27	$ 10,345,600.9
Ratio derived from each source over 10 year period	0.04%	5.19%	0.99%	77.48%	8.83%

Year ended Dec. 31	SOURCE OF INCOME				
	Income from lease of road	Miscellaneous rent income	Miscellaneous nonoperating physical property	Dividend income	Income from funded securities
1923	$ 1,458.58	$ 512,659.19	$ 58 025.59	$ 8,403,519.37	$ 552,287.05
1924	35,542.66	508,119.18	24,666.19	9,287,584.26	1,137,522.83
1925	4,581.88	590,913.88	69,917.22	9,310,874.63	807,706.37
1926	1,727.52	502,631.23	101,096.28	9,472,726.99	2,316,394.01
1927	1,581.27	630,518.15	69,318.09	9,663,282.95	1,311,274.02
1928	1,497.52	658,961.48	165,913.48	9,771,836.46	872,[illegible]21.11
1929	1,427.52	687,719.87	189,317.69	9,363,567.09	985,259.81
1930	1,427.52	672,612.32	190,530.97	13,285,672.32	554,376.52
1931	1,427.52	667,282.57	166,934.36	9,201,614.76	1,151,748.34
1932	777.36	650,235.08	165,314.98	3,047,898.44	656,305.91
Totals	$51,449.35	$6,081,652.95	$ 1,159,034.85	$90,808,577.27	$ 10,345,600.97
Ratio derived from each source over 10 year period	0.04%	5.19%	0.99%	77.48%	8.83%

Defendants' Exhibit G.

Table 9 (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

THE GREAT NORTHERN RAILWAY COMPANY FROM VARIOUS SOURCES FOR THE YEARS 1923 TO 1932 INCLUSIVE.

	SOURCE OF INCOME				
...eous ...ing L...	Dividend income	Income from funded securities	Income from unfunded securities and accounts	Miscellaneous income	Total nonoperating income
...5.59	$ 8,403,519.37	$ 552,287.05	$ 440,670.33	$ 344,640.66	$ 10,313,260.77
...6.19	9,287,584.26	1,137,522.83	459,540.91	200,901.40	11,653,877.43
...7.22	9,310,874.63	807,706.37	438,911.36	205,343.05	11,428,248.39
...6.28	9,472,726.99	2,316,394.01	568,640.62	212,453.84	13,175,670.49
...8.09	9,663,282.95	1,311,274.02	906,001.37	256,296.90	12,838,272.75
...3.48	9,771,836.46	872,921.11	1,373,170.53	190,017.46	13,032,123.04
...7.69	9,363,567.09	985,259.81	595,023.08	243,911.82	12,026,226.88
...0.97	13,285,672.32	554,376.52	582,616.63	241,081.07	15,528,317.35
...4.36	9,201,614.76	1,151,748.34	667,342.27	254,286.68	12,110,636.50
...4.98	3,047,898.44	656,305.91	367,835.40	207,724.43	5,096,091.60
...4.85	$90,808,577.27	$ 10,345,600.97	$ 6,399,752.50	$ 2,356,657.31	$117,202,725.20
0.99%	77.48%	8.83%	5.46%	2.01%	100%

SOURCE OF INCOME

llaneous rating l f I	Dividend income	Income from funded securities	Income from unfunded securities and accounts	Miscellaneous income	Total nonoperating income
025.59	$ 8,403,519.37	$ 552,287.05	$ 440,670.33	$ 344,640.66	$ 10,313,260.77
,666.19	9,287,584.26	1,137,522.83	459,540.91	200 901.40	11,653,877.43
,917.22	9,310,874.63	807,706.37	438,911.36	205,343.05	11,428,248.39
,096.28	9,472,726.99	2,316,394.01	568,640.62	212,453.84	13,175,670.49
,318.09	9,663,282.95	1,311,274.02	906,001.37	256,296.90	12,838,272.75
,913.48	9,771,836.46	872,421.11	1,373,170.53	190,017.46	13,032,123.04
,317.69	9,363,567.09	985,259.81	595,023.08	243,911.82	12,086,226.88
,530.97	13,285,672.32	554,376.52	582,616.63	241,081.07	15,528,317.35
,934.36	9,201,614.76	1,151,748.34	667,342.27	254,286.68	12,110,636.50
,314.98	3,047,898.44	656,305.91	367,835.40	207,724.43	5,096,091.60
,034.85	$90,808,577.27	$ 10,345,600.97	$ 6,399,752.50	$ 2,356,657.31	$117,202,725.20
	0.99%	77.48%	8.83%	5.46%	2.01%	100%

BISMARCK TRIBUNE 31281

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Defts. Ex. H.

B. M.

Table — 10 — (L. A. Baker)

Great Northern Railway Company

Statement of Net Railway Operating Income and Nonoperating Income for The Years 1922 to 1932 Inclusive, Also a Comparison for The Seven Year Periods Ended December 31, 1928, 1929, 1930, 1931 and 1932

Year ended December 31	Net railway operating income	Nonoperating income	Total
1922	$ 17,276,598	$ 10,487,006	$27,763,604
1923	24,731,992	5,085,539	29,817,531
1924	24,201,287	11,653,877	35,855,164
1925	28,276,183	11,428,248	39,704,431
1926	31,280,429	13,175,670	44,456,099
1927	29,202,540	12,838,273	42,040,813
1928	31,294,069	13,032,123	44,326,192
1929	32,457,523	12,026,227	44,483,750
1930	21,912,508	15,528,317	37,440,825
1931	12,669,420	12,110,637	24,780,057
1932	1,290,551	5,096,092	6,386,643

Seven year period ended December 31	Average net railway operating income	Average nonoperating income	Total	Ratio of nonoperating income to total
1928	$ 26,609,014	$11,100,105	$37,709,119	29.44%
1929	28,777,717	11,319,994	40,097,711	28.23
1930	28,374,934	12,811,819	41,186,753	31.11
1931	26,727,524	12,877,071	39,604,595	32.51
1932	22,872,434	11,972,477	34,844,911	34.36

Table 11 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

APPORTIONMENT OF STOCK AND BOND VALUE TO OPERATING AND NONOPERATING PROPERTY

Assessment year	Market value of stocks and bonds 5 year average preceding assessment year	Ratio of nonoperating income to total income - 7 year average	Ratio of nonoperating assets to total capital assets December 31, preceding assessment year	Composite ratio
1929	$548,693,569	29.44%	26.68%	28.06%
1930	569,631,125	28.23	26.56	27.39
1931	595,646,943	31.11	26.39	28.75
1932	576,315,169	32.51	26.78	29.65
1933	543,982,795	34.36	26.21	30.29

Source: Stock and bond values as reported by Great Northern Railway to North Dakota Ta

GREAT NORTHERN RAILWAY COMPANY

APPORTIONMENT OF STOCK AND BOND VALUE TO OPERATING AND NONOPERATING PROPERTY

Assessment year	Market value of stocks and bonds 5 year average preceding assessment year	Ratio of nonoperating income to total income - 7 year average	Ratio of nonoperating assets to total capital assets, December 31, preceding assessment year	Composite ratio
1929	$548,693,569	29.44%	26.60%	28.06%
1930	569,631,125	28.23	26.56	27.39
1931	595,646,943	31.11	26.39	28.75
1932	576,315,169	32.51	26.78	29.65
1933	543,982,795	34.36	26.21	30.29

Source: Stock and bond values as reported by Great Northern Railway to North Dakota Tax

Defendants' Exhibit I.

Table - 11 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

D VALUE TO OPERATING AND NONOPERATING PROPERTY - YEARS 1929 TO 1933, INCLUSIVE

Ratio of operating to total - 7 year	Ratio of nonoperating assets to total capital assets, December 31, preceding assessment year	Composite ratio	Stock and bond value assigned to nonoperating property by composite ratio	Stock and bond value assigned to operating property (Total less amount assigned to nonoperating property)
.44%	26.60%	28.06%	$153,963,977	$394,731,592
.23	26.56	27.39	156,021,965	413,609,160
.11	26.39	28.75	171,248,496	424,398,447
.51	26.78	29.65	170,877,448	405,437,721
.36	26.21	30.29	155,685,389	358,297,406

by Great Northern Railway to North Dakota Tax Commissioner.

GREAT NORTHERN RAILWAY COMPANY

VALUE TO OPERATING AND NONOPERATING PROPERTY - YEARS 1929 TO 1933, INCLUSIVE

o of rating to total - 7 year	Ratio of nonoperating assets to total capital assets, December 31, preceding assessment year	Composite ratio	Stock and bond value assigned to nonoperating property by composite ratio	Stock and bond value assigned to operating property (Total less amount assigned to nonoperating property)
.44%	26.68%	28.06%	$153,963,977	$394,731,592
.23	26.56	27.39	156,021,965	413,609,160
.11	26.39	28.75	171,248,496	424,398,447
.51	26.78	29.65	170,877,448	405,437,721
.36	26.21	30.29	155,685,389	358,297,406

by Great Northern Railway to North Dakota Tax Commissioner.

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Defts. Ex. J.

B. M.

Table — 12 — (L. A. Baker)

Great Northern Railway Company

Comparison of Freight Traffic Density Per Mile of All Tracks Operated on Entire System and in The State of North Dakota for The Years 1926 To 1933 Inclusive.

Year	Miles of all tracks operated at end of year	Ton miles of Revenue Freight	
		Total	Average per mile of all tracks operated
	System		
1926	11,656.89	8,902,970,446	763,752
1927	11,643.72	8,958,349,961	769,371
1928	11,895.26	10,127,253,509	851,368
1929	11,868.58	10,150,709,921	855,259
1930	11,935.54	8,720,583,904	730,640
1931	11,924.24	6,151,063,399	515,845
1932	12,049.56	4,324,700,394	358,909
1933	11,936.04	5,431,602,934	455,059
	State of North Dakota		
1926	2,370.01	1,562,613,140	659,328
1927	2,362.76	1,653,329,407	699,745
1928	2,375.44	2,047,255,759	861,843
1929	2,396.54	1,764,278,588	736,177
1930	2,408.15	1,587,079,064	659,045
1931	2,407.84	1,168,970,768	485,485
1932	2,404.83	910,222,371	378,498
1933	2,400.98	1,078,295,209	449,106

Revenue Ton Miles per Mile of all Tracks operated

Year	System	State of North Dakota	Ratio
1926	763,752	659,328	86.33%
1927	769,371	699,745	90.95
1928	851,368	861,843	101.23
1929	855,259	736,177	86.08
1930	730,640	659,045	90.20
1931	515,845	485,485	94.11
1932	358,909	378,498	105.46
1933	455,059	449,106	98.69

Source: Taken from I. C. C. Statistics of Railways and from Annual Reports of Great Northern Railway Company.

Duffy & K. B. M.

Table - 13 - (L. A. Baker

GREAT NORTHERN RAILWAY COMPANY

STATISTICS OF OPERATION PER MILE OF TRACK, 1926 -

Year	SYSTEM				NORTH DAKOTA		
	Miles of track operated at end of year	Per mile of all tracks			Miles of track operated at end of year	Per mile of al	
		Operating revenue	Traffic units (1)	Car and locomotive miles		Operating revenue	Traffic units (1)
1926	11,656.89	$10,070	798,882	56,853	2,370.01	$8,932	692,606
1927	11,643.72	10,126	803,774	55,980	2,362.76	9,300	733,341
1928	11,895.26	10,654	882,325	59,257	2,375.44	10,480	891,050
1929	11,868.58	10,611	886,263	58,239	2,396.54	9,398	765,436
1930	11,935.54	8,797	755,103	51,425	2,408.15	7,758	682,690
1931	11,924.24	6,465	533,944	40,027	2,407.84	5,765	500,690
1932	12,049.56	4,610	372,541	30,933	2,404.83	4,367	390,077
5 year period ended Dec. 31							
1930	11,935.54	9,936	816,019	55,707	2,408.15	9,073	744,907
1931	11,924.24	9,269	767,387	52,649	2,407.84	8,468	708,796
1932	12,049.56	8,138	678,574	47,469	2,404.83	7,525	643,597

Year	SYSTEM				NORTH DAKOTA		
	Miles of track operated at end of year	Per mile of all tracks			Miles of track operated at end of year	Per mile of all	
		Operating revenue	Traffic units (1)	Car and locomotive Miles		Operating revenue	Traffic units (1)
1926	11,656.89	$10,070	798,882	56,853	2,370.01	$8,932	692,606
1927	11,643.72	10,126	803,774	55,980	2,362.76	9,300	733,341
1928	11,895.26	10,654	882,325	59,257	2,375.44	10,480	891,050
1929	11,868.58	10,611	886,263	58,239	2,396.54	9,398	765,436
1930	11,935.54	8,797	755,103	51,425	2,408.15	7,758	682,690
1931	11,924.24	6,465	533,944	40,027	2,407.84	5,765	500,690
1932	12,049.56	4,610	372,541	30,933	2,404.83	4,367	390,077
5 year period ended Dec. 31							
1930	11,935.54	9,936	816,019	55,707	2,408.15	9,073	744,907
1931	11,924.24	9,269	767,387	52,649	2,407.84	8,468	708,796
1932	12,049.56	8,138	678,574	47,469	2,404.83	7,525	643,597

(1) Traffic units is a composite factor made up of revenue passengers carried one mile and tons of

Source: Derived from data contained in the annual reports of the Great Northern Railway Company t
Commissioners of North Dakota and from annual reports of the company to stockholders.

Defendants' Exhibit K.

Table - 13 - (L. A. Baker

GREAT NORTHERN RAILWAY COMPANY

RATIOS OF OPERATION PER MILE OF TRACK, 1926 - 1932

	NORTH DAKOTA				Ratio of North Dakota to entire line -			
	Miles of track operated at end of year	Per mile of all tracks			Operating revenue	Traffic units	Car and locomotive miles	Composite ratio
		Operating revenue	Traffic units (1)	Car and locomotive miles				
1926	2,370.01	$8,932	692,606	53,696	88.70%	86.70%	94.45%	89.95%
1927	2,362.76	9,300	733,341	54,305	91.84	91.24	97.01	93.36
1928	2,375.44	10,480	891,050	51,805	98.37	101.39	104.30	101.55
1929	2,396.54	9,398	765,436	55,454	88.57	86.37	95.22	90.95
1930	2,408.15	7,758	682,690	49,903	88.19	90.41	97.94	91.88
1931	2,407.84	5,765	500,690	40,008	89.17	93.77	99.95	94.30
1932	2,404.83	4,367	390,077	31,932	94.73	104.71	103.23	100.89
1927	2,408.15	9,073	744,907	54,437	91.31	91.29	97.72	93.44
1929	2,407.84	8,468	708,796	51,875	91.36	98.36	98.53	94.98
1932	2,404.83	7,525	643,597	47,655	92.47	94.85	100.39	95.90

and motive s	NORTH DAKOTA: Miles of track operated at end of year	NORTH DAKOTA: Per mile of all tracks: Operating revenue	Traffic units (1)	Car and locomotive miles	Ratio of North Dakota to entire line: Operating revenue	Traffic units	Car and locomotive miles	Composite ratio
853	2,370.01	$8,932	692,606	53,696	88.70%	86.70%	94.45%	89.93%
980	2,362.76	9,300	733,341	54,305	91.94	91.24	97.01	93.36
257	2,375.44	10,480	891,050	51,805	98.37	101.39	104.39	101.55
239	2,396.54	9,398	765,436	55,454	88.57	86.37	95.22	90.05
425	2,408.15	7,758	682,690	49,903	88.19	90.41	97.94	91.88
027	2,407.84	5,765	500,690	40,008	89.17	93.77	99.95	94.30
933	2,404.83	4,367	390,077	31,932	94.73	104.71	103.23	100.89
707	2,408.15	9,073	744,907	54,437	91.31	91.29	97.72	93.44
649	2,407.84	8,468	708,796	51,875	91.36	92.36	98.53	94.08
869	2,404.83	7,525	643,597	47,655	92.47	94.85	100.39	95.90

ume passengers carried one mile and tons of revenue freight carried one mile.

orts of the Great Northern Railway Company to the State Tax Commissioner and Board of Railroad
eports of the company to stockholders.

329 Defts. Ex. L.

B. M.

Table — 14 — (L. A. Baker)

Great Northern Railway Company

Comparison of Net Operating Revenues for System and State of North Dakota

Year	System			
	Operating revenues	Operating expenses	Operating ratio	Net revenues
1925	$114,924,960	$ 75,827,285	66.00%	$ 39,097,672
1926	117,383,909	75,285,464	64.14	42,098,445
1927	117,904,004	78,355,579	66.46	39,548,425
1928	126,737,091	83,235,116	65.67	43,501,975
1929	125,932,808	82,862,910	65.80	43,069,898
1930	104,996,076	72,565,878	69.11	32,430,198
1931	77,087,455	55,285,953	71.72	21,801,501
1932	55,549,246	45,655,673	82.19	9,893,574
Average — 8 year period	105,064,443	71,134,232	67.71	33,930,211
Average per mile of track operated	$ 8,719	$ 5,903		$ 2,816

Year	North Dakota			
	Operating revenues	Operating expenses	Operating ratio	Net revenues
1925	$ 20,709,272	$11,993,468	57.91%	$ 8,715,805
1926	21,169,076	12,404,560	58.60	8,764,516
1927	21,972,497	12,954,313	58.96	9,018,184
1928	24,894,745	13,949,468	56.03	10,945,277
1929	22,523,436	14,079,678	62.51	8,443,758
1930	18,681,284	12,551,779	67.19	6,129,505
1931	13,881,026	9,966,340	71.80	3,914,686
1932	10,501,981	8,470,999	80.66	2,030,981
Average — 8 year period	$ 19,291,664	$ 12,046,325	62.44%	$ 7,245,339
Average per mile of track operated	8,022	5,009		3,013

Source: Reports of company to State Railroad Commission and to Tax Commissioner of North Dakota.

330 Defts. Ex. M.

B. M.

Table — 15 — (L. A. Baker)

Great Northern Railway Company

Total Tons of Revenue Freight Originated in Each State for The Five Year Period, 1928–1932, Average Tonnage Originated Per Annum and Average Tonnage Originated Per Mile of Track Operated in Each State Per Annum.

State	Miles of track operated at end of period (1)	Revenue freight originated 1928–1932 (Tons)	Percent of System Total	Averages 1928 - 1932	
				Average tons originated per annum in each state	Ave. No. of tons originated per mile of track oper'd—per annum
Wisconsin	234.09	840,128	0.67%	168,026	718
Minnesota	3,155.62	67,615,392	54.13	13,523,078	4,285
Iowa	115.26				
North Dakota	2,404.83	10,265,341	8.22	2,053,068	854
South Dakota	404.88	1,084,896	0.87	216,979	536
Montana	2,646.32	10,330,182	8.27	2,066,036	781
Idaho	135.85	605,124	0.48	121,025	891
Washington	1,925.50	16,478,220	13.19	3,295,644	1,712
Oregon	285.70	1,164,459	0.93	232,892	815
California	118.51				
Manitoba	196.92				
British Columbia	422.08				
System	12,049.56	124,922,190	100%	24,984,438	2,073

(1) Average mileage operated in each state during the five year period was not available, however, there was but little change in track mileage during the five year period with the exception of the extension into California.

Source: Derived from records of the Great Northern Railway Company or reports of the Great Northern Railway Company to Railroad Commissions or Public Utility Commissions of the several states.

Table - 17 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

VARIOUS RATIOS REFLECTING RELATIVE BUSINESS PERFORMED IN NORTH DAKOTA AND RELATIVE UNITS OF PROPERTY LOCATED IN NORTH DAKOTA

(Ratios applicable Assessment years 1929 - 1933)

ount	Entire System	North Dakota	Percentage in North Dakota
E - Revenue car and locomo- ar average preceding assess-			
1929	652,804,301	127,752,405	19.57%
1930	668,963,843	131,204,568	19.61
1931	664,887,162	131,091,594	19.72
1932	627,799,764	124,906,156	19.90
1933	571,982,004	114,602,429	20.04
iles plus passenger miles - ceding assessment years -			
1929	9,328,362,174	1,724,454,417	18.49
1930	9,728,997,990	1,783,790,014	18.33
1931	9,739,629,049	1,793,848,432	18.42
1932	9,150,507,022	1,706,668,009	18.65
1933	8,176,514,395	1,547,740,217	18.93
NUES - 5 year average preced- re -1929	$ 117,438,614	$ 21,629,070	18.42
1930	120,576,554	22,253,805	18.46
1931	118,590,778	21,848,207	18.42
1932	110,531,487	20,390,598	18.45
1933	98,060,535	18,096,494	18.45
END OF YEAR - preceding			
1929	11,895.26	2,375.44	19.97
1930	11,868.58	2,396.54	20.19
1931	11,935.54	2,408.15	20.18
1932	11,924.24	2,407.84	20.19
1933	12,049.56	2,404.83	19.96
ERATED AND TRACKAGE LEASED nd of year preceding assess-			
1929	10,854.62	2,375.44	21.88
1930	10,827.07	2,396.54	22.13
1931	10,883.49	2,408.15	22.13
1932	10,895.18	2,407.84	22.10
1933	11,018.13	2,404.83	21.83
ES - 5 year average preceding			
1929	$ 39,855,512.45	$ 8,945,945	22.45
1930	41,463,282.86	9,177,508	22.13
1931	40,129,788.10	8,660,248	21.58
1932	36,070,399.42	7,690,282	21.32
1933	30,139,429.12	6,292,841	20.88

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Table - 17 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

COMPARISON OF VARIOUS RATIOS REFLECTING RELATIVE BUSINESS PERFORMED IN NORT
RELATIVE UNITS OF PROPERTY LOCATED IN NORTH DAKOTA

(Ratios applicable assessment years 1929 - 1933)

Factors of apportionment	Entire System	North D
TRANSPORTATION SERVICE - Revenue car and locomotive mileage - 5 year average preceding assessment years - 1929	652,804,301	127,75
1930	668,963,843	131,20
1931	664,887,162	131,09
1932	627,799,764	124,90
1933	571,982,004	114,60
TRAFFIC UNITS - Ton miles plus passenger miles - 5 year average preceding assessment years - 1929	9,328,362,174	1,724,45
1930	9,728,997,990	1,783,79
1931	9,739,629,049	1,793,84
1932	9,150,507,022	1,706,66
1933	8,176,514,395	1,547,74
TOTAL OPERATING REVENUES - 5 year average preceding assessment years -1929	$ 117,438,614	$ 21,62
1930	120,576,554	22,25
1931	118,590,778	21,84
1932	110,531,487	20,39
1933	98,060,535	18,09
TRACKAGE OPERATED AT END OF YEAR - preceding assessment years - 1929	11,895.26	
1930	11,868.58	
1931	11,935.54	
1932	11,924.24	
1933	12,049.56	
TRACKAGE OWNED AND OPERATED AND TRACKAGE LEASED AND OPERATED - at end of year preceding assessment years - 1929	10,854.62	
1930	10,827.07	
1931	10,883.49	
1932	10,895.18	
1933	11,018.13	
NET OPERATING REVENUES - 5 year average preceding assessment years - 1929	$ 39,855,512.45	$ 8,94
1930	41,463,282.86	9,17
1931	40,129,788.10	8,66
1932	36,070,399.42	7,69
1933	30,139,429.12	6,29
[illegible] COST OF REPRODUCTION -		

1932	110,531,487	20,390,598	18.45
1933	98,060,535	18,096,494	18.45
END OF YEAR - preceding			
1929	11,895.26	2,375.44	19.97
1930	11,868.58	2,396.54	20.19
1931	11,935.54	2,408.15	20.18
1932	11,924.24	2,407.84	20.19
1933	12,049.56	2,404.83	19.96
ERATED AND TRACKAGE LEASED nd of year preceding assess-			
1929	10,854.62	2,375.44	21.88
1930	10,827.07	2,396.54	22.13
1931	10,883.49	2,408.15	22.13
1932	10,895.18	2,407.84	22.10
1933	11,018.13	2,404.83	21.83
ES - 5 year average preceding			
1929	$ 39,855,512.45	$ 8,945,945	22.45
1930	41,463,282.86	9,177,508	22.13
1931	40,129,788.10	8,660,248	21.58
1932	36,070,399.42	7,690,282	21.32
1933	30,139,429.12	6,292,841	20.88
I.C.C. COST OF REPRODUCTION - plus additions and betterments preceding assessment years -			
1929	542,563,288	74,865,189	13.80
1930	545,205,416	75,911,661	13.92
1931	555,209,015	77,385,164	13.94
1932	564,022,017	78,057,683	13.84
1933(I.C.C.value, new)	628,106,411	89,964,680	14.32

AVERAGES DERIVED FROM ABOVE TABULATION

apportionment	Percentage of North Dakota business or property applicable to assessment years - 1929	1930	1931	1932	1933
VERAGES					
ge of transportation service, perating revenues - (Average	18.826%	18.80%	18.853%	19.00%	19.14%
perated & three "use factors" ctors)	19.113	19.148	19.185	19.298	19.345
erated & leased and operated s" (Average of four factors)	19.59	19.632	19.673	19.775	19.812
ysical property & "use- fact- ve factors)	18.05	18.102	18.136	18.206	18.34
ysical property, transporta- ie units, gross revenues & ge of six factors)	18.783	18.773	18.710	18.725	18.763

Defendants' Exhibit 473

	1932	110,531,487	20,3
	1933	98,060,535	18,0
TRACKAGE OPERATED AT END OF YEAR - preceding assessment years -	1929	11,895.26	
	1930	11,868.58	
	1931	11,935.54	
	1932	11,924.24	
	1933	12,049.56	
TRACKAGE OWNED AND OPERATED AND TRACKAGE LEASED AND OPERATED - at end of year preceding assessment years -	1929	10,854.62	
	1930	10,827.07	
	1931	10,883.49	
	1932	10,895.18	
	1933	11,018.13	
NET OPERATING REVENUES - 5 year average preceding assessment years -	1929	$ 39,855,512.45	$ 8,9
	1930	41,463,282.86	9,1
	1931	40,129,788.10	8,6
	1932	36,070,399.42	7,6
	1933	30,139,429.12	6,2
PHYSICAL PROPERTY - I.C.C. COST OF REPRODUCTION - Less depreciation plus additions and betterments as of end of year preceding assessment years -	1929	542,563,288	74,8
	1930	545,205,416	85,9
	1931	555,209,015	77,3
	1932	564,022,017	78,0
	1933(I.C.C. value, new)	628,106,411	89,9

AVERAGES DERIVED FROM ABOVE TABULATION

Composite factors of apportionment	Percentage of North Dakota applicable to a		
	1929	1930	1931
AVERAGES			
"USE FACTORS" - Average of transportation service, traffic units and operating revenues - (Average of three factors)	18.826%	18.80%	18.853%
Average of trackage operated & three "use factors" (Average of four factors)	19.113	19.148	19.185
Trackage owned and operated & leased and operated & three "use factors" (Average of four factors)	19.59	19.632	19.673
Trackage operated, physical property & "use factors" (Average of five factors)	18.05	18.102	18.136
Trackage operated, physical property, transportation service, traffic units, gross revenues & net revenues (Average of six factors)	18.783	18.773	18.710

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Table —18— (L. A. Baker)

Assessed Value of the Great Northern Railway Property in North Dakota for the Years 1915 to 1933 Inclusive

Assessment year	Assessment		Basis of Assessment (1)	Full value on basis of final assessment	Increase or decrease compared with previous year on full value basis—(Decrease–D, Increase–I)	
	By State Board of Equalization	As adjusted by U. S. District Court			Amount	Percent
1915	$22,422,465		25%	$89,689,860	$.....	.....
1916	20,152,048		25%	80,608,192	9,081,668-D	10.13-D
1917	28,318,277	$24,623,693	25%	98,494,772	17,886,580-I	22.19-I
1918	31,176,247	27,086,062	30%	90,286,873	8,207,899-D	8.33-D
1919	86,603,330		100%	86,603,330	3,683,543-D	4.08-D
1920	86,599,348		100%	86,599,348	3,982-D	.....
1921	82,267,096		100%	82,267,096	4,332,252-D	5.00-D
1922	82,267,047		100%	82,267,047	49-D	.....
1923	82,267,047		100%	82,267,047	.....	.....
1924	82,266,895		100%	82,266,895	152-D	.....
1925	82,266,353		100%	82,266,353	542-D	.....
1926	82,266,220		100%	82,266,220	133-D	.....
1927	82,266,387		100%	82,266,387	167-I	.....
1928	82,266,386		100%	82,266,386	1-D	.....
1929	83,294,677		100%	83,294,677	1,028,291-I	1.25-I
1930	83,294,688		100%	83,294,688	11-I	.....
1931	82,999,997		100%	82,999,997	294,691-D	0.35-D
1932	78,850,024		100%	78,850,024	4,149,973-D	5.00-D
1933	78,832,888		100%	78,832,888	17,136-D	0.02-D

Comparison of 1917 and 1919 assessments with that of 1933 on basis of full value

1917 assessment	$98,494,772 (2)	1919 assessment	$86,603,330
1933 assessment	78,832,888	1933 assessment	78,832,888
Amount of reduction	$19,661,884	Amount of reduction	$ 7,770,442
Percent reduction	19.96%	Percent reduction	8.97%

(1) Basis of assessment for the years 1915 to 1916 was estimated to be 25% of full value:
Basis of assessment for the year 1917 was found by the United States District Court for North Dakota in the 1917 railroad tax cases to be 25% of full value.
Basis of assessment for 1918 for railroad property under the classification law of 1917 was 30% of full value.
Basis of assessment of railroad property from 1919 to 1933 was 100% of full value.

(2) Full value basis.

Table - 19 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

ALLOCATION OF VALUE TO NORTH DAKOTA - STOCK AND BOND AND 6% CAPITALIZATION METHODS - FI

Allocation to State made by five methods each of which employs differ

Report year	System value of operating property as reflected by - Stock and bond value - 5 year average less estimated value of nonoperating property	Net railway operating income - 5 year average capitalized at 6%	Average of stock and bond value and capitalized value	Percentage of System value in North Dakota as reflected by indicated factors	Values apportioned to North Da - According to stock and bond values	According to capitalized value	Accor to av of st and b capita val
1. Apportionment to North Dakota on basis of transportation service, traffic unit							
1929	$ 394,731,592	$480,848,367	$437,789,980	18.826%	$74,312,170	$90,524,514	$82,41
1930	413,609,106	508,369,150	460,989,128	18.80	77,758,512	95,573,400	86,66
1931	424,398,447	487,156,900	455,777,674	18.353	80,011,839	91,843,690	85,92
1932	405,437,721	425,120,200	415,278,961	19.00	77,033,167	80,772,838	78,90
1933	358,297,406	332,080,233	345,188,820	19.14	68,578,124	63,560,157	66,06
2. Apportionment to North Dakota on basis of mileage of tracks operated							
1929	394,731,592	480,848,367	437,789,980	19.113	75,445,049	91,904,548	83,67
1930	413,609,106	508,369,150	460,989,128	19.148	79,197,872	97,342,525	88,27
1931	424,398,447	487,156,900	455,777,674	19.185	81,420,842	93,461,051	87,44
1932	405,437,721	425,120,200	415,278,961	19.298	78,241,371	82,039,696	80,14
1933	358,297,406	332,080,233	345,188,820	19.345	69,312,633	64,240,921	66,7
3. Apportionment to North Dakota on basis of mileage of all tracks owned and operated and le							
1929	394,731,592	480,848,367	437,789,980	19.59	77,327,919	94,198 95	85,76
1930	413,609,106	508,369,150	460,989,128	19.632	81,199,740	99 803,232	90,5
1931	424,398,447	487,156,900	455,777,674	19.677	83,491,906	95,838,377	89,6
1932	405,437,721	425,120,200	415,278,961	19.775	80,175,309	84,067,520	82,1
1933	358,297,406	332,080,233	345,188,820	19.812	70,985,382	65,791,736	68,3
4. Apportionment to North Dakota on basis of trackage operated, physical prop							
1929	394,731,592	480,848,367	437,789,980	18.05	71,249,052	86,793,130	79,0
1930	413,609,106	508,369,150	460,989,128	18.102	74,871,520	92,024,984	83,4
1931	424,398,447	487,156,900	455,777,674	18.136	76,968,902	88,350,775	82,6
1932	405,437,721	425,120,200	415,278,961	18.206	73,813,991	77,397,384	75,60
[illegible]	[illegible]	332,080,233	345,188,820	18.34	65,711,744	60,903,515	63,3

	Average [illegible] estimated value of nonoperating property	5 year average capitalized at 6%	bond value and capitalized value	reflected by indicated factors	to stock and bond values	to capitalized value	of stock and bond capitalized value
1. Apportionment to North Dakota on basis of transportation service, traffic units							
1929	$ 394,731,592	$480,848,367	$437,789,980	18.826%	$74,312,170	$90,524,514	$82,418,
1930	413,609,106	508,369,150	460,989,128	18.80	77,758,512	95,573,400	86,665,
1931	424,398,447	487,156,900	455,777,674	18.353	80,011,839	91,843,690	85,927,
1932	405,437,721	425,120,200	415,278,961	19.00	77,033,167	80,772,838	78,903,
1933	358,297,406	332,080,233	345,188,820	19.14	68,578,124	63,560,157	66,069,
2. Apportionment to North Dakota on basis of mileage of tracks operated an							
1929	394,731,592	480,848,367	437,789,980	19.113	75,445,049	91,904,548	83,674,
1930	413,609,106	508,369,150	460,989,128	19.148	79,197,872	97,342,525	88,270,
1931	424,398,447	487,156,900	455,777,674	19.185	81,420,842	93,461,051	87,440,
1932	405,437,721	425,120,200	415,278,961	19.298	78,241,371	82,039,696	80,140,
1933	358,297,406	332,080,233	345,188,820	19.345	69,312,633	64,240,921	66,776,
3. Apportionment to North Dakota on basis of mileage of all tracks owned and operated and lease							
1929	394,731,592	480,848,367	437,789,980	19.59	77,327,919	94,198 95	85,763,
1930	413,609,106	508,369,150	460,989,128	19.632	81,199,740	99 803,232	90,501,
1931	424,398,447	487,156,900	455,777,674	19.677	83,491,906	95,838,377	89,665,
1932	405,437,721	425,120,200	415,278,961	19.775	80,175,309	84,067,520	82,121,
1933	358,297,406	332,080,233	345,188,820	19.812	70,985,882	65,791,736	68,388,
4. Apportionment to North Dakota on basis of trackage operated, physical proper							
1929	394,731,592	480,848,367	437,789,980	18.05	71,249,052	86,793,130	79,021,
1930	413,609,106	508,369,150	460,989,128	18.102	74,871,520	92,024,984	83,448,
1931	424,398,447	487,156,900	455,777,674	18.136	76,968,902	88,350,775	82,659,
1932	405,437,721	425,120,200	415,278,961	18.206	73,817,201	77,397,384	75,605,
1933	358,297,406	332,080,233	345,188,820	18.34	65,711,744	60,903,515	63,307,
5. Apportionment to North Dakota on basis of trackage operated physical property transportation serv							
1929	394,731,592	480,848,367	437,789,980	18.783	74,142,435	90,317,749	82,230,
1930	413,609,106	508,369,150	460,989,128	18.773	77,646,837	95,436,141	86,541,
1931	424,398,447	487,156,900	455,777,674	18.770	79,404,349	91,147,056	85,276,
1932	405,437,721	425,120,200	415,278,961	18.725	75,918,213	79,603,757	77,760,
1933	358,297,406	332,080,233	345,188,820	18.761	67,227,362	62,320,234	64,767,

Table - 19 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

AND BOND AND 6% CAPITALIZATION METHODS - FIVE YEAR PERIOD - ASSESSMENT YEARS 1929 - 1933

five methods each of which employs different combinations of apportionment factors

Percentage of System value in North Dakota as reflected by indicated factors	Values apportioned to North Dakota: According to stock and bond values	According to capitalized value	According to average of stock and bond & capitalized value	Assessment	Ratio of assessment to assigned values: Stock and bond values	Capitalized value	Composite value
Mile of transportation service, traffic units and gross operating revenues averaged							
18.826%	$74,312,170	$90,524,514	$82,418,342	$ 83,294,677	112.09%	92.01%	101.06%
18.80	77,758,512	95,573,400	86,665,956	83,294,688	107.12	87.15	96.11
18.353	80,011,839	91,843,690	85,927,765	82,999,997	103.73	90.37	96.59
19.00	77,033,167	80,772,838	78,903,003	78,850,024	102.36	97.62	99.93
19.14	68,578,124	63,560,157	66,069,140	78,832,888	114.95	124.03	119.32
Mile on basis of mileage of tracks operated and three "use factors" averaged							
19.113	75,445,049	91,904,548	83,674,799	83,294,677	110.40	90.63	99.55
19.148	79,197,872	97,342,525	88,270,198	83,294,688	105.17	85.57	94.36
19.185	81,420,842	93,461,051	87,440,947	82,999,997	101.94	88.81	94.92
19.298	78,241,371	82,039,696	80,140,534	78,850,024	100.78	96.11	98.39
19.345	69,312,633	64,240,921	66,776,777	78,832,888	113.73	122.71	118.05
Mile of all tracks owned and operated and leased and operated and three "use factors" averaged							
19.59	77,327,919	94,19[illegible] 95	85,763,057	83,294,677	107.72	88.42	97.12
19.632	81,199,740	99 803,932	90,501,386	83,294,688	102.58	83.46	92.04
19.677	83,491,906	95,838,377	89,665,142	82,999,997	99.41	86.60	92.57
19.775	80,175,309	84,067,520	82,121,415	78,850,024	98.35	93.79	96.02
19.812	70,985,882	65,791,736	68,388,809	78,832,888	111.05	119.82	115.27
Mile on basis of trackage operated, physical property and three "use factors" averaged							
18.05	71,249,052	86,793,130	79,021,091	83,294,677	116.91	95.97	105.41
18.102	74,871,520	92,024,984	83,448,252	83,294,688	111.25	90.51	99.82
18.136	76,968,902	88,350,775	82,659,839	82,999,997	107.84	93.94	100.41
18.206	73,813,291	77,397,384	75,605,688	78,850,024	106.82	101.88	104.29
[illegible]	[illegible]	80,901,515	83,307,629	78,832,888	119.97	129.44	124.52

Reflected by indicated factors	to stock and bond values	to capitalized value	of stock and bond & capitalized value		Stock and bond values	Capitalized value	Composite value
Basis of transportation service, traffic units and gross operating revenues averaged							
18.826%	$74,312,170	$90,524,514	$82,418,342	$ 83,294,677	112.09%	92.01%	101.06%
18.80	77,758,512	95,573,400	86,665,956	83,294,688	107.12	87.15	96.11
18.353	80,011,839	91,843,690	85,927,765	82,999,997	103.73	90.37	96.59
19.00	77,033,167	80,772,838	78,903,003	78,850,024	102.36	97.62	99.93
19.14	68,578,124	63,560,157	66,069,140	78,832,888	114.95	124.03	119.72
Basis on basis of mileage of tracks operated and three "use factors" averaged							
19.113	75,445,049	91,904,548	83,674,799	83,294,677	110.40	90.63	99.55
19.148	79,197,872	97,342,525	88,270,198	83,294,688	105.17	85.57	94.36
19.185	81,420,842	93,461,051	87,440,947	82,999,997	101.94	88.81	94.92
19.298	78,241,371	82,039,696	80,140,534	78,850,024	100.78	96.11	98.39
19.345	69,312,633	64,240,921	66,776,777	78,832,888	113.73	122.71	118.05
Basis of all tracks owned and operated and leased and operated and three "use factors" averaged							
19.59	77,327,919	94,198 95	85,763,057	83,294,677	107.72	88.42	97.12
19.632	81,199,740	99 803,732	90,501,386	83,294,688	102.58	83.46	92.04
19.677	83,491,906	95,838,377	89,665,142	82,999,997	99.41	86.60	92.57
19.775	80,175,309	84,067,520	82,121,415	78,850,024	98.35	93.79	96.08
19.812	70,985,882	65,791,736	68,388,809	78,832,888	111.05	119.82	115.27
Basis of trackage operated, physical property and three "use factors" averaged							
18.05	71,249,052	86,793,130	79,021,091	83,294,677	116.91	95.97	105.41
18.102	74,871,520	92,024,984	83,448,252	83,294,688	111.25	90.51	99.82
18.136	76,968,902	88,350,775	82,659,839	82,999,997	107.84	93.94	100.41
18.206	73,817,201	77,397,384	75,605,588	78,850,024	106.82	101.88	104.29
18.34	65,711,744	60,903,515	63,307,629	78,832,888	119.97	129.44	124.52
Operated, physical property transportation service, traffic units, gross revenues & net revenues averaged							
18.783	74,142,435	90,317,749	82,230,092	83,294,677	112.34	92.22	101.20
18.773	77,646,837	95,436,141	86,541,489	83,294,688	107.27	87.28	96.25
18.770	79,404,949	91,147,056	85,276,003	82,999,997	104.53	91.06	97.73
18.725	75,918,213	79,603,757	77,760,985	78,850,024	103.86	99.05	101.36
18.763	67,227,142	62,304,214	64,765,678	78,832,888	117.26	126.52	121.73

Table - 20 - (J. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

ALLOCATION OF VALUE TO NORTH DAKOTA - STOCK AND BOND AND 5% CAPITALIZATION METHODS - FI

Allocation to State is made by five methods each of which employs different

Assessment year	System value of operating property as reflected by: Stock and bond value - 5 year average less estimated value of nonoperating property	Net railway operating income - 5 year average capitalized at 5%	Average of stock and bond value and capitalized value	Percentage of system value in North Dakota as reflected by indicated factors	Values apportioned to North Da: According to stock and bond values	According to 5% capitalized value	Acco aver stoc bond capi valu
1. Apportionment to North Dakota on basis of transportation service, traffic units							
[illegible]	$ 394,731,592	$577,018,040	$485,874,816	18.826%	$74,312,170	$108,629,416	$91,4
1930	413,609,106	610,042,980	511,826,043	18.80	77,758,512	114,688,080	96,2
1931	424,398,447	584,588,280	504,493,364	18.853	80,011,839	110,212,428	95,1
1932	405,437,721	510,144,240	457,790,980	19.00	77,033,167	96,927,406	86,9
1933	358,297,406	398,496,280	378,396,843	19.14	68,578,124	76,272,888	72,4
2. Apportionment to North Dakota on basis of mileage of tracks operated and t							
1929	394,731,592	577,018,040	485,874,816	19.113	75,445,049	110,285,458	92,8
1930	413,609,106	610,042,980	511,826,043	19.148	79,197,872	116,811,030	98,0
1931	424,398,447	584,588,280	504,493,364	19.185	81,420,842	112,153,262	96,7
1932	405,437,721	510,144,240	457,790,980	19.298	78,241,371	98,447,635	88,3
1933	358,297,406	398,496,280	378,396,843	19.345	69,312,533	77,089,105	73,2
3. Apportionment to North Dakota on basis of mileage of all tracks owned and operated and lea							
1929	394,731,592	577,018,040	485,874,816	19.59	77,327,919	113,037,834	95,1
1930	413,609,106	610,042,980	511,826,043	19.632	81,199,740	119,763,638	100,4
1931	424,398,447	584,588,280	504,493,364	19.673	83,491,906	115,006,052	99,2
1932	405,437,721	510,144,240	457,790,980	19.775	80,175,309	100,881,023	90,5
1933	358,297,406	398,496,280	378,396,843	19.812	70,985,882	78,950,083	74,9
4. Apportionment to North Dakota on basis of trackage operated, physical propert							
1929	394,731,592	577,018,040	485,874,816	18.05	71,249,052	104,151,756	87,7
1930	413,609,106	610,042,980	511,826,043	18.102	74,871,520	110,429,980	92,6
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Assess-ment year	System value of operating property as reflected by — Stock and bond value - 5 year average less estimated value of nonoperating property	Net railway operating income - 5 year average capitalized at 5%	Average of stock and bond value and capitalized value	of system value in North Dakota as reflected by indicated factors	Values apportioned to North D… — According to stock and bond values	According to % capitalized value	Acco… aver… stoc… bon… cap… valu…
1. Apportionment to North Dakota on basis of transportation service, traffic units							
1929	$ 394,731,592	$577,018,040	$485,874,816	18.826%	$74,312,170	$108,629,416	$91,4…
1930	413,609,106	610,042,980	511,826,043	18.80	77,758,512	114,688,080	96,2…
1931	424,398,447	584,588,280	504,493,364	18.853	80,011,839	110,212,428	95,1…
1932	405,437,721	510,144,240	457,790,980	19.00	77,033,167	96,927,406	86,9…
1933	358,297,406	398,496,280	378,396,843	19.14	68,578,124	76,272,888	72,4…
2. Apportionment to North Dakota on basis of mileage of tracks operated and …							
1929	394,731,592	577,018,040	485,874,816	19.113	75,445,049	110,285,458	92,8…
1930	413,609,106	610,042,980	511,826,043	19.148	79,197,873	116,811,070	98,0…
1931	424,398,447	584,588,280	504,493,364	19.185	81,420,842	112,153,262	96,7…
1932	405,437,721	510,144,240	457,790,980	19.298	78,241,371	98,447,635	88,3…
1933	358,297,406	398,496,280	378,396,843	19.345	69,312,633	77,089,105	73,2…
3. Apportionment to North Dakota on basis of mileage of all tracks owned and operated and l…							
1929	394,731,592	577,018,040	485,874,816	19.59	77,327,919	113,037,834	95,1…
1930	413,609,106	610,042,980	511,826,043	19.632	81,199,740	119,763,638	100,5…
1931	424,398,447	584,588,280	504,493,364	19.673	83,491,906	115,006,052	99,2…
1932	405,437,721	510,144,240	457,790,980	19.775	80,175,309	100,881,023	90,5…
1933	358,297,406	398,496,280	378,396,843	19.812	70,985,882	78,950,083	74,9…
4. Apportionment to North Dakota on basis of trackage operated, physical prope…							
1929	394,731,592	577,018,040	485,874,816	18.05	71,249,052	104,151,756	87,7…
1930	413,609,106	610,042,980	511,826,043	18.102	74,871,520	110,429,980	92,6…
1931	424,398,447	584,588,280	504,493,364	18.136	76,968,302	106,020,939	91,5…
1932	405,437,721	510,144,240	457,790,980	18.306	73,813,991	92,876,860	83,8…
1933	358,297,406	398,496,280	378,396,843	18.34	65,711,744	73,084,218	69,4…
5. Apportionment to North Dakota on basis of trackage operated physical property, transportation se…							
1929	394,731,592	577,018,040	485,874,816	18.783	74,142,435	108,391,298	91,2…
1930	413,609,106	610,042,980	511,826,043	18.773	77,645,837	114,523,369	96,1…
1931	424,398,447	584,588,280	504,493,364	18.710	79,404,949	109,376,467	94,4…
1932	405,437,721	510,144,240	457,790,980	18.725	75,918,213	95,524,509	85,7…
1933	358,297,406	398,496,280	378,396,843	18.763	67,227,342	74,769,857	70,9…

Defendants' Exhibit Q.

Table - 20 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY

E AND BOND AND 5% CAPITALIZATION METHODS - FIVE YEAR PERIOD - ASSESSMENT YEARS 1929-1933

five methods each of which employs different combinations of apportionment factors

Percentage of system value in North Dakota as reflected by indicated factors	Values apportioned to North Dakota: According to stock and bond values	According to capitalized value	According to average of stock and bond and capitalized value	Assessment	Ratio of assessment to assigned values - Stock and bond value	Capitalized value	Composite value
Basis of transportation service, traffic units and gross operating revenues averaged							
18.826%	$74,312,170	$108,629,416	$91,470,793	$83,294,677	112.09%	76.68%	91.06%
18.80	77,758,512	114,688,080	96,223,296	83,294,688	107.12	72.63	86.56
18.853	80,011,839	110,212,428	95,112,134	82,999,997	103.73	75.31	87.27
19.00	77,033,167	96,927,406	86,980,286	78,850,024	102.36	81.35	90.65
19.14	68,578,104	76,272,888	72,425,156	78,832,888	114.95	103.36	108.85
On basis of mileage of tracks operated and three "use factors" averaged							
19.113	75,445,049	110,285,458	92,865,254	83,294,677	110.40	75.53	89.69
19.148	79,197,872	116,811,030	98,004,451	83,294,688	105.17	71.31	84.99
19.185	81,420,842	112,153,262	96,787,052	82,999,997	101.94	74.01	85.76
19.298	78,241,371	98,447,635	88,34 ,503	78,850,024	100.78	80.09	89.25
19.345	69,312,633	77,089,105	73,200,869	78,832,888	113.74	102.26	107.69
Mileage of all tracks owned and operated and leased and operated and three "use factors" averaged							
19.59	77,327,919	113,037,834	95,182,876	83,294,677	107.72	73.69	87.51
19.632	81,199,740	119,763,638	100,481,689	83,294,688	102.58	69.55	82.90
19.673	83,491,906	115,006,052	99,248,979	82,999,997	99.41	72.17	83.63
19.775	80,175,309	100,881,023	90,528,166	78,850,024	98.35	78.16	87.10
19.812	70,985,882	78,950,083	74,967,983	78,832,888	111.05	99.85	105.16
Basis of trackage operated, physical property and three "use factors" averaged.							
18.05	71,249,052	104,151,756	87,700,404	83,294,677	116.91	79.97	94.98
18.102	74,871,520	110,429,980	92,650,750	83,294,688	111.25	75.43	89.90
18.136	76,868,902	106,020,930	91,444,916	82,999,997	107.94	78.29	90.72

Per cent value in North Dakota as reflected by indicated factors	Values apportioned to North Dakota: According to stock and bond values	According to capitalized value	According to average of stock and bond and capitalized value	Assessment	Ratio of assessment to assigned values — Stock and bond value	Capitalized value	Composite value
Use of transportation service, traffic units and gross operating revenues averaged							
18.826%	$74,312,170	$108,629,416	$91,470,793	$83,294,677	112.09%	76.68%	91.06%
18.80	77,758,512	114,688,080	96,223,296	83,294,688	107.12	72.63	86.56
18.853	80,011,833	110,212,428	95,112,134	82,999,997	103.73	75.31	87.27
19.00	77,033,167	96,927,406	86,980,286	78,850,024	102.36	81.35	90.65
19.14	68,578,124	76,272,888	72,425,156	78,832,888	114.95	103.36	108.85
On basis of mileage of tracks operated and three "use factors" averaged							
19.113	75,445,049	110,285,458	92,865,254	83,294,677	110.40	75.53	89.69
19.148	79,197,872	116,811,030	98,004,451	83,294,688	105.17	71.31	84.99
19.185	81,420,842	112,153,262	96,787,052	82,999,997	101.94	74.01	85.76
19.298	78,241,371	98,447,635	88,34 ,503	78,850,024	100.78	80.09	89.25
19.345	69,312,633	77,089,105	73,200,869	78,832,888	113.74	102.26	107.69
Area of all tracks owned and operated and leased and operated and three "use factors" averaged							
19.59	77,327,919	113,037,834	95,182,876	83,294,677	107.72	73.69	87.51
19.632	81,199,740	119,763,638	100,481,689	83,294,688	102.58	69.55	82.90
19.673	83,491,906	115,006,052	99,248,979	82,999,997	99.41	72.17	83.63
19.775	80,175,309	100,881,023	90,528,166	78,850,024	98.35	78.16	87.10
19.812	70,985,882	78,950,083	74,967,983	78,832,888	111.05	99.85	105.16
Basis of trackage operated, physical property and three "use factors" averaged.							
18.05	71,249,052	104,151,756	87,700,404	83,294,677	116.91	79.97	94.98
18.102	74,871,520	110,429,980	92,650,750	83,294,688	111.25	75.43	89.90
18.136	76,968,902	106,020,930	91,494,916	82,999,997	107.84	78.29	90.72
18.306	73,813,991	92,876,860	83,345,426	78,850,024	106.82	84.90	94.61
18.34	65,711,744	73,084,218	69,397,981	78,832,888	119.97	107.86	113.60
Operated physical property, transportation service, traffic units, gross revenues & net revenues averaged							
18.783	74,142,435	108,391,298	91,261,867	83,294,677	112.34	76.85	91.27
18.773	77,645,837	114,523,369	96,035,103	83,294,688	107.27	72.73	86.69
18.710	79,404,949	109,376,467	94,390,708	82,999,997	104.53	75.88	87.93
18.725	75,918,213	95,524,509	85,721,361	78,850,024	103.86	82.54	91.98
18.763	67,227,342	74,769,857	70,998,599	78,832,888	117.26	105.43	111.03

Table - 23 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY - Tax Year 1931

(C. F. Raich method)

PERATING PROPERTY IN NORTH DAKOTA IN 1931 AS REFLECTED BY MARKET VALUE
KS AND BONDS AND BY NET RAILWAY OPERATING INCOME CAPITALIZED AT 6% -
BOTH FOR THE FIVE YEAR PERIOD PRECEDING THE ASSESSMENT YEAR

onds - 5 year average market value	$595,646,943
ed value of nonoperating property	171,248,496
nd value of operating property	424,398,447
value - average net railway operating income for the eriod 1926-1930 ($29,229,414) capitalized at 6%	487,156,900
ystem value - average of (a) and (b)	455,777,674

R MILE OF TRACK OF ENTIRE SYSTEM -
divided by 11,935.54 miles - $ 38,187

five year period preceding the 1931 assessment a Mile of Track in North Dakota
ried less traffic and required less use of rolling stock than the average mile
entire system. Under these circumstances a mile of track is not a proper unit
se in apportioning to North Dakota its equitable proportion of system value ex-
such allowance or correction as is indicated by the relative worth of a mile of
Dakota compared with the average mile of track of the entire system.

ue worth of a mile of track in North Dakota to an average mile of track of the
s indicated in the schedules below -

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COMPARED

Averages per mile of track - 5 years ended December 31, 1930			
Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rolling stock (Car and locomotive mileage)	Miles of track operated Dec. 31, 1930
$ 9,936	816,019	55,707	11,935.54
9,073	744,907	54,437	2,406.15
91.31%	91.29%	97.72%	(20.18%)

ION:

draft 4 B.M.

Table - 23 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY - Tax Year 1931

(C. F. Balch method)

VALUE OF OPERATING PROPERTY IN NORTH DAKOTA IN 1931 AS REFLECTED BY M
OF STOCKS AND BONDS AND BY NET RAILWAY OPERATING INCOME CAPITALIZE
BOTH FOR THE FIVE YEAR PERIOD PRECEDING THE ASSESSMENT YE

(a) Stocks and bonds - 5 year average market value - - -

...apportioning to North Dakota its equitable proportion of system value ex... such allowance or correction as is indicated by the relative worth of a mile of ...kota compared with the average mile of track of the entire system.

...e worth of a mile of track in North Dakota to an average mile of track of the ... indicated in the schedules below -

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COMPARED

Averages per mile of track - 5 years ended December 31, 1930			Miles of track operated Dec. 31, 1930
Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rolling stock (Car and locomotive mileage)	
$ 9,936	816,019	55,707	11,935.54
9,073	744,907	54,437	2,406.15
91.31%	91.29%	97.72%	(20.18%)

TION:

of track of entire system, collectively, are worth per mile - - -	$ 38,187
of track in North Dakota, collectively, are worth per mile -	
of average on basis of operating revenues or - - - - - - - - - -	34,869
of average on basis of traffic units or - - - - - - - - - - - -	34,861
of average on basis of use of rolling stock or - - - - - - - - -	37,316
(a), (b) and (c) -	107,046
of (a), (b) and (c) representing the value of a mile of in North Dakota -	$ 35,682

OF ROAD IN NORTH DAKOTA:

ses of assignment to state - $35,682 x 2,408.15 miles - - - - - -	$ 85,927,608
GREGATE VALUE OF ROAD IN NORTH DAKOTA, AS FOUND ABOVE, ASSESSMENT	
value of road in North Dakota in 1931 - - - - - - - - - - - - -	85,927,608
in 1931 -	82,999,997
ssessment to assigned value found above - - - - - - - - - - - -	96.59%

r termed "use of rolling stock" as used in this exhibit is developed on a somewhat basis than is used in the so-called Balch method because the information is not available. The percentage result would differ but slightly if at all, ercentage result shown above in connection with the factor "use of rolling stock".

Defendants' Exhibit R. 281

[illegible] under these circumstances a mile of track [illegible]
of fixture to use in apportioning to North Dakota its equitable proportion
cept by making such allowance or correction as is indicated by the relative
track in North Dakota compared with the average mile of track of the entire

The relative worth of a mile of track in North Dakota to an average mi
entire system is indicated in the schedules below =

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA C

	Averages per mile of track - 5 years ended December 31.		
	Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rollin (Car and loc mileage)
System	$ 9,936	816,019	55,707
North Dakota	9,073	744,907	54,437
Ratio of N. D. to System	91.31%	91.29%	97.72%

EQUALIZING EQUATION:

The miles of track of entire system, collectively, are worth per mile

The miles of track in North Dakota, collectively, are worth per mile =
(a) 91.31% of average on basis of operating revenues or - - - - - - -
(b) 91.29% of average on basis of traffic units or - - - - - - - - -
(c) 97.72% of average on basis of use of rolling stock or - - - - - -

(d) Sum of (a), (b) and (c) -

(e) Average of (a), (b) and (c) representing the value of a mile of track in North Dakota -

AGGREGATE VALUE OF ROAD IN NORTH DAKOTA:

On three bases of assignment to state - $35,682 x 2,408.15 miles - - -

COMPARISON OF AGGREGATE VALUE OF ROAD IN NORTH DAKOTA, AS FOUND ABOVE, WITH THE 1931 ASSESSMENT

Aggregate value of road in North Dakota in 1931 - - - - - - - - - -

Assessment in 1931 -

Ratio of assessment to assigned value found above - - - - - - - - -

NOTE: The factor termed "use of rolling stock" as used in this exhibit is
what different basis than is used in the so-called Balch method becaus
required was not available. The percentage result would differ but sl
from the percentage result shown above in connection with the factor "

Table 24 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY Tax Year 1932

(C. F. Balch method)

ERATING PROPERTY IN NORTH DAKOTA IN 1932 AS REFLECTED BY MARKET VALUE OF
AND BONDS AND BY NET RAILWAY OPERATING INCOME CAPITALIZED AT 6%
TH FOR THE FIVE YEAR PERIOD PRECEDING THE ASSESSMENT YEAR

s - 5 year average market value	$ 576,315,169
value of nonoperating property	170,877,448
value of operating property	$405,437,721
me - average net railway operating income for the five 7-1931 ($25,507,212) capitalized at 6%	$ 425,120,200
n value - average (a) and (b)	$ 415,278,961

ILE OF TRACK OF ENTIRE SYSTEM -
vided by 11,924.24 miles $ 34,826

e year period preceding the 1932 assessment a Mile of Track in North Dakota
d less traffic and required less use of rolling stock than the average mile
ire system. Under these circumstances a mile of track is not a proper unit
n apportioning to North Dakota its equitable proportion of system value
ch allowance or correction as is indicated by the relative worth of a mile
akota compared with the average mile of track of the entire system.

orth of a mile of track in North Dakota to an average mile of track of the
dicated in the schedules below -

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COMPARED

Averages per mile of track - five years ended December 31, 1931			
Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rolling stock (Car and locomotive mileage)	Miles of track operated Dec. 31, 1931
$9,269	761,387	52,649	11,924.24
8,468	708,796	51,878	2,407.84
91.36%	92.36%	98.53%	(20.19%)

ack of the entire system, collectively, are worth per mile - $ 34,826

- North Dakota, collectively, are worth per mile -

office B.M.

Table 24 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY Tax Year 1932

(C. F. Balch method)

VALUE OF OPERATING PROPERTY IN NORTH DAKOTA IN 1932 AS REFLECTED BY MARKET STOCKS AND BONDS AND BY NET RAILWAY OPERATING INCOME CAPITALIZED AT BOTH FOR THE FIVE YEAR PERIOD PRECEDING THE ASSESSMENT YEAR

(a) Stocks and bonds - 5 year average market value - - - - - - - - - - - - - - - -
Less estimated value of nonoperating property - - - - - - - - - - - - - - - - - -

Stock and bond value of operating property -

(b) Capitalized value - average net railway operating income for the five year period 1927-1931 ($25,507,212) capitalized at 6% - - - - - - - - - - - - - - -

(c) Composite system value - average (a) and (b) - - - - - - - - - - - - - - - - -

AVERAGE VALUE PER MILE OF TRACK OF ENTIRE SYSTEM -
$415,278,961 divided by 11,924.24 miles -

During the five year period preceding the 1932 assessment a Mile of Track in ... earned less, carried less traffic and required less use of rolling stock than the ... of track of the entire system. Under these circumstances a mile of track is not ... of measure to use in apportioning to North Dakota its equitable proportion of ... except by making such allowance or correction as is indicated by the relative ... of track in North Dakota compared with the average mile of track of the entire ...

The relative worth of a mile of track in North Dakota to an average mile of ... entire system is indicated in the schedules below

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COM...

	Averages per mile of track - five years ended December 31, ...		
	Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rolling stock (Car and locomotive mileage)
System	$9,269	761,387	52,649
North Dakota	8,468	703,796	51,875
Ratio of N. D. to System	91.36%	92.36%	98.53%

EQUALIZING EQUATION:

The miles of track of the entire system, collectively, are worth per mile ... of track in North Dakota, collectively, are worth per mile ...

[redacted] as is indicated by the relative worth of a mile [redacted] average mile of track of the entire system.

worth of a mile of track in North Dakota to an average mile of track of the
ndicated in the schedules below:

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COMPARED

Averages per mile of track - five years ended December 31, 193			
Operating revenues	Traffic units (Ton miles plus Passenger miles)	Use of rolling stock (Car and locomotive mileage)	Miles of track operated Dec. 31, 1931
$9,269	761,387	52,649	11,924.24
8,468	708,796	51,875	2,407.84
91.36%	92.36%	98.53%	(20.19%)

:

track of the entire system, collectively, are worth per mile - - - $ 34,826

track in North Dakota, collectively, are worth per mile -
average on basis of operating revenues or - - - - - - - - - - - - - 31,817
average on basis of traffic units or - - - - - - - - - - - - - - - - 32,165
average on basis of use of rolling stock or - - - - - - - - - - - - 34,314

), (b) and (c) - $98,296

f (a), (b) and (c) representing the value of a mile of
North Dakota - $ 32,765

ROAD IN NORTH DAKOTA:

s of assignment to State - $33,765 x 2,407.84 miles - - - - - - - - $78,892,878

EGATE VALUE OF ROAD IN NORTH DAKOTA, AS FOUND ABOVE,
SSESSMENT

ue of road in North Dakota in 1932 - - - - - - - - - - - - - - - - - $78,892,878

1932 - 78,850,024

sement to assigned value found above - - - - - - - - - - - - - - - - 99.95%

ormed 'use of rolling stock' as used in this exhibit is developed on a somewhat
is than is used in the so-called Baloh method because the information required
able. The percentage result would differ but slightly if at all, from the per-
t shown above in connection with the factor 'use of rolling stock'.

[illegible] such allowance or correction as is indicated by the relative [illegible] North Dakota compared with the average mile of track of the entire sy

The relative worth of a mile of track in North Dakota to an average mile of entire system is indicated in the schedules below

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COM

	Averages per mile of track - five years ended December 31, 1		
	Operating revenues	Traffic units (Ton miles plus Passenger miles)	Use of rolling sto (Car and locomoti mileage)
System	$9,269	761,387	52,649
North Dakota	8,468	708,796	51,875
Ratio of N. D. to System	91.36%	92.36%	98.53%

EQUALIZING EQUATION:

The miles of track of the entire system, collectively, are worth per mile

The miles of track in North Dakota, collectively, are worth per mile
(a) 91.36% of average on basis of operating revenues or
(b) 92.36% of average on basis of traffic units or
(c) 98.53% of average on basis of use of rolling stock or

(d) Sum of (a), (b) and (c)

(e) Average of (a), (b) and (c) representing the value of a mile of track in North Dakota

AGGREGATE VALUE OF ROAD IN NORTH DAKOTA:

On three bases of assignment to State - $33,765 x 2,407.84 miles

COMPARISON OF AGGREGATE VALUE OF ROAD IN NORTH DAKOTA, AS FOUND ABOVE, WITH THE 1932 ASSESSMENT

Aggregate value of road in North Dakota in 1932

Assessment in 1932

Ratio of assessment to assigned value found above

NOTE: The factor termed "use of rolling stock" as used in this exhibit is develo different basis than is used in the so-called Baloh method because the info was not available. The percentage result would differ but slightly if at a centage result shown above in connection with the factor "use of rolling st

Table - 25 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY - Tax Year 1933

(C. F. Balch method)

RATING PROPERTY IN NORTH DAKOTA IN 1933 AS REFLECTED BY MARKET VALUE OF STOCKS BONDS AND BY NET RAILWAY OPERATING INCOME CAPITALIZED AT 6% - BOTH FOR THE FIVE YEAR PERIOD PRECEDING THE ASSESSMENT YEAR

bonds - 5 year average market value - - -

Table - 25 - (L. A. Baker)

GREAT NORTHERN RAILWAY COMPANY - Tax Year 1933

(C. F. Balch method)

VALUE OF OPERATING PROPERTY IN NORTH DAKOTA IN 1933 AS REFLECTED BY MARKET V
AND BONDS AND BY NET RAILWAY OPERATING INCOME CAPITALIZED AT 6% -
FOR THE FIVE YEAR PERIOD PRECEDING THE ASSESSMENT YEAR

(a) Stocks and bonds - 5 year average market value -
Less estimated value of nonoperating property -

Stock and bond value of operating property -

(b) Capitalized value - average net railway operating income for the five year period 1928-1932 ($19,924,814) capitalized at 6%

(c) Composite system value - average of (a) and (b) -

AVERAGE VALUE PER MILE OF TRACK OF ENTIRE SYSTEM -
$345,188,820 divided by 12,049.56 miles -

During the five year period preceding the 1933 assessment a Mile of Trac
earned less, carried less traffic but required slightly more use of rolling s
rage mile of track of the entire system. Under these circumstances a mile of
proper unit of measure to use in apportioning to North Dakota its equitable p
value except by making such allowance or correction as is indicated by the re
mile of track in North Dakota compared with the average mile of track of the

The relative worth of a mile of track in North Dakota to an average mile
entire system is indicated in the schedules below -

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COMPA

	Averages per mile of track - five years ended December 31, 1		
	Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rolling stock (Car and locomotive mileag
System	$8,138	678,574	47,469
North Dakota	7,525	643,597	47,655
Ratio of N. D. to System	92.47%	94.85%	100.39%

EQUALIZING EQUATION:

[illegible] of track of the entire system, collectively, are worth per mil

[redacted] to North Dakota its equitable proportion of system
making such allowance or correction as is indicated by the relative worth of a
a North Dakota compared with the average mile of track of the entire system.

ve worth of a mile of track in North Dakota to an average mile of track of the
s indicated in the schedules below -

'ATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COMPARED

Averages per mile of track - five years ended December 31, 1932			Miles of track operated December 31, 1932
Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rolling stock (Car and locomotive mileage)	
$8,138	678,574	47,469	12,049.56
7,525	643,597	47,655	2,404.83
92.47%	94.85%	100.39%	(19.96%)

TION:

of track of the entire system, collectively, are worth per mile - $ 28,647

of track in North Dakota, collectively, are worth per mile -
% of average on basis of operating revenues or - - - - - - - - - - 26,490
% of average on basis of traffic units or - - - - - - - - - - - - 27,172
% of average on basis of use of rolling stock or - - - - - - - - - 28,758

(a), (b) and (c) - $ 82,420

e of (a), (b) and (c) representing the value of a mile of
in North Dakota - $ 27,473

OF ROAD IN NORTH DAKOTA

asis of assignment to State - $27,473 x 2,404.83 miles - - - - - - $66,075,109

GGREGATE VALUE OF ROAD IN NORTH DAKOTA, AS FOUND ABOVE,
ASSESSMENT

Value of road in North Dakota in 1933 - - - - - - - - - - - - - - $66,075,109

in 1933 - $78,832,888

ssessment to assigned value found above - - - - - - - - - - - - - 119.31%

r termed "use of rolling stock" as used in this exhibit is developed on a
ifferent basis than is used in the so-called Balch method because the informa-
ed was not available. The percentage result would differ but slightly if at
the percentage result shown above in connection with the factor "use of rolling

Defendants' Exhibit 285

value except by making such allowance or correction as is indicated by the mile of track in North Dakota compared with the average mile of track of th

The relative worth of a mile of track in North Dakota to an average mi entire system is indicated in the schedules below -

STATISTICS OF OPERATION - SYSTEM AND STATE OF NORTH DAKOTA COM

	Averages per mile of track - five years ended December 31		
	Operating revenues	Traffic units (Ton miles plus passenger miles)	Use of rolling stock (Car and locomotive mile
System	$8,138	678,574	47,469
North Dakota	7,525	643,597	47,655
Ratio of N. D. to System	92.47%	94.85%	100.39%

EQUALIZING EQUATION:

The miles of track of the entire system, collectively, are worth per mi

The miles of track in North Dakota, collectively, are worth per mile -
(a) 92.47% of average on basis of operating revenues or - - - - - - -
(b) 94.85% of average on basis of traffic units or - - - - - - - - -
(c) 100.39% of average on basis of use of rolling stock or - - - - -

(d) Sum of (a), (b) and (c) -

(e) Average of (a), (b) and (c) representing the value of a mile of track in North Dakota -

AGGREGATE VALUE OF ROAD IN NORTH DAKOTA

On three bases of assignment to State - $27,473 x 2,404.83 miles - - -

COMPARISON OF AGGREGATE VALUE OF ROAD IN NORTH DAKOTA, AS FOUND ABOVE, WITH THE 1933 ASSESSMENT

Aggregate value of road in North Dakota in 1933 - - - - - - - - - -

Assessment in 1933 -

Ratio of assessment to assigned value found above - - - - - - - - -

NOTE: The factor termed "use of rolling stock" as used in this exhibit is d somewhat different basis than is used in the so-called Balch method bec tion required was not available. The percentage result would differ bu all, from the percentage result shown above in connection with the fact stock"

Deft's Ex. U.

B. M.

Table —29— (L. A. Baker)

Great Northern Railway Company

Comparison of Farm Income with the Assessed Valuation of Farm Real and Personal Property, 1924-1932 (1)

Year	Gross income from farm production	Cash income from farm production	Assessment of farm real and personal property	Ratio of assessment to gross income	Ratio of assessment to cash income
1924	$300,506,000	$279,900,000	$934,835,409	311%	334%
1925	274,952,000	250,646,000	919,087,223	334	367
1926	209,132,000	185,009,000	919,615,018	440	497
1927	268,535,000	245,719,000	910,856,054	339	371
1928	249,585,000	227,810,000	909,468,343	364	399
1929	211,942,000	189,748,000	904,605,843	427	477
1930	147,931,000	129,184,000	903,526,834	611	699
1931	72,716,000	59,622,000	761,175,701	1047	1277
1932	71,364,000	60,626,000	745,671,817	1045	1230
Averages-1924-1928	$260,542,000	$237,816,800	$918,772,409	353%	386%
1929-1932	$100,790,600	$ 87,836,000	$828,745,049	822%	944%

Comparison of Great Northern Assessment with Total Operating Revenues in North Dakota for the Years 1924-1932

Year	Total operating revenues	Assessment	Ratio of assessment to total revenues
1924	$19,399,759	$82,266,895	424%
1925	20,709,272	82,266,353	397
1926	21,169,076	82,266,220	389
1927	21,972,497	82,266,387	374
1928	24,894,745	82,266,386	330
1929	22,523,436	83,294,677	370
1930	18,681,284	83,294,688	446
1931	13,881,026	82,999,997	598
1932	10,501,981	78,850,024	751
Averages—1924-1928	$21,629,070	$82,266,448	380%
1929-1932	16,396,942	82,109,847	501

(1) Basis of assessment 100% of full value. For definitions—See attached sheet.

Source: Agricultural data from bulletins of the United States Department of Agriculture. Railroad data from reports of the Great Northern Railway Company. Assessment data from records of the State Board of Equalization.

339 Defts. Ex. V.

B. M.

Table — 30 — (L. A. Baker)

Comparison of Gross Income and Cash Income From Farm Production With Gross Revenues of Railroads Within North Dakota for The Years 1924 To 1933 Inclusive

Year	Gross Income from farm production	Index 1924=100%	Gross Revenues of all railroads within the state	Index 1924=100%	Ratio of railway gross revenues to farm gross income
1924	$300,506,000	100%	$46,225,667	100%	15.38%
1925	274,952,000	91	48,914,420	106	17.79
1926	209,132,000	70	47,123,240	102	22.53
1927	268,535,000	89	49,976,540	108	18.61
1928	249,585,000	83	55,640,956	120	22.29
1929	211,942,000	71	50,831,121	110	23.98
1930	147,931,000	49	42,273,888	91	28.58
1931	72,716,000	24	30,598,870	66	42.08
1932	71,364,000	24	23,694,649	51	33.20
1933			25,709,166	56	

Year	Cash Income from farm production	Index 1924=100%	Gross Revenues of all railroads within the state	Index 1924=100%	Ratio of railway gross revenues to cash income
1924	$279,900,000	100%	$46,225,667	100%	16.52%
1925	250,646,000	90	48,914,420	106	19.52
1926	185,009,000	66	47,123,240	102	25.47
1927	245,719,000	88	49,976,540	108	20.34
1928	227,810,000	81	55,640,956	120	24.42
1929	189,748,000	68	50,831,121	110	26.79
1930	129,184,000	46	42,273,888	91	32.72
1931	59,622,000	21	30,598,870	66	51.32
1932	60,626,000	22	23,694,649	51	39.08
1933			25,709,166	56	

Comparison of Railroad Assessments with Farm Property Assessments 1924–1933

Year	Assessment of farm property (1)	Index 1924=100%	Assessment of all railroad property	Index 1924=100%	Ratio of railway to farm property assessment
1924	$934,835,409	100%	$200,672,447	100%	21.46%
1925	919,087,223	98	200,671,492	100	21.83
1926	919,615,018	98	200,829,062	100	21.84
1927	910,856,054	97	196,596,523(2)	98	21.58
1928	909,468,343	97	194,085,385	97	21.34
1929	904,605,843	97	194,554,432	97	21.51
1930	903,526,834	97	193,979,415	97	21.47
1931	761,175,701	81	188,143,706	94	24.72
1932	745,671,817	80	171,720,600	86	23.03
1933	676,533,722	72	171,633,448	86	25.37

(1) Includes farm lands and farm personal property.

(2) Reflects adjustment in Soo Railway assessment by U. S. District Court.

340 Defts. Ex. W.

B. M.

Table — 31 — (L. A. Baker)

Great Northern Railway Company

Comparison of Gross Income and Cash Income From Farm Production in North Dakota With Gross Operating Revenues of The Great Northern Railway Company in North Dakota for The Years 1924 To 1932 Inclusive.

Year	Gross income from farm production in North Dakota (1)	Cash income from farm production in North Dakota (2)	Total Operating revenues of G. N. Ry. Co. in N. D.
1924	$300,506,000	$279,900,000	$19,399,759
1925	274,952,000	250,646,000	20,709,272
1926	209,132,000	185,009,000	21,169,076
1927	268,535,000	245,719,000	21,972,497
1928	249,585,000	227,810,000	24,894,745
1929	211,942,000	189,748,000	22,523,436
1930	147,931,000	129,184,000	18,681,284
1931	72,716,000	59,622,000	13,881,026
1932	71,364,000	60,626,000	10,501,981
Averages —			
5 Years — 1924–1928	$260,542,000	$237,816,800	$21,629,070
4 Years — 1929–1932	$100,790,600	$ 87,836,000	$16,396,942
Ratios			
Ratio of 1931 income to 5 year average, 1924–1928	27.91%	25.07%	64.18%
Ratio of 1932 income to 5 year average, 1924–1928	27.39%	25.60%	48.55%
Ratio of 4 year average 1929–1932 to 5 year average 1924–1928	38.68%	36.93%	75.81%

(1) Gross income relates to the value of the quantities consumed on the farm plus quantities actually sold off the farm where these were produced.

(2) Cash income relates to the value of the quantities actually sold off the farm where these were produced. Cash income from crops is credited to the year in which the commodities were produced, evaluated at prices received during the marketing season of the particular crop. Cash income from livestock is computed on a calendar year basis, evaluated at average prices for the calendar year.

Source: Agricultural data from Bulletins of the U. S. Department of Agriculture.

341 Deft's Ex. X.

B. M.

Table —32— (L. A. Baker)

Taxable Value of All Property and of Farm Lands, Farm Personalty and Total Farm Property and Ratio of Taxable Value of Farm Property to Total Taxable Value of All Property in North Dakota for Certain Specified Years

Year	Taxable value of specified classes of property				Ratio of farm property to total value
	All property	Farm lands	Farm personalty	Total Farm property	
1917	$ 379,522,711	$ 216,448,191(1)	$44,543,000	$ 260,991,191	68.77%
1918	388,647,856	229,397,669(1)	37,048,454	266,446,123	68.56
1919	1,522,637,234	1,072,167,653	59,509,886	1,131,677,539	74.32
1920	1,501,359,358	1,035,771,210	70,384,589	1,106,155,799	73.68
1921	1,377,427,843	946,067,579	45,599,851	991,667,430	71.99
1922	1,308,315,404	899,305,661	46,465,113	945,770,774	72.29
1923	1,089,123,614	675,765,662	83,002,669	758,768,331	69.67
1924	1,007,832,658	639,729,824	71,755,000	711,484,824	70.60
1925	998,355,506	619,090,051	71,058,000	690,148,051	69.13
1926	998,180,492	617,926,038	70,989,000	688,915,038	69.02
1927	995,509,739	611,922,033	69,963,000	681,885,033	68.50
1928	991,576,496	610,473,498	71,286,000	681,759,498	68.75
1929	997,701,484	606,474,060	72,159,000	678,633,060	68.20
1930	998,981,981	604,934,916	72,398,983	677,333,899	67.80
1931	880,432,053	504,929,139	66,106,639	571,035,778	64.86
1932	569,330,822	338,537,832	37,841,311	376,379,143	66.11
1933	519,367,483	301,333,941	34,494,645	335,828,586	64.66

(1) Includes farm improvements.

Note: Taxable value of farm lands taken from published reports of the state board of equalization. Taxable value of farm personalty derived from abstract of tax lists reports for the years 1917 to 1923 (listed as published in Bulletins and reports issued by State Tax Commissioner) also derived from same source for years 1930, 1931 and 1932. Data for years 1924-1929 is partly estimated.

42 Deft's Ex. Y.

B. M.

Table —33— (L. A. Baker)

Average Tax Rate on All Property Subject to General Property Tax 1920-1933

Year	Taxable value all property (1)	Total property taxes (2)	Average tax rate
1920	$1,501,359,358	$29,766,078	1.98%
1921	1,377,427,843	31,188,020	2.26
1922	1,308,315,404	30,411,396	2.32
1923	1,089,123,614	29,793,046	2.74
1924	1,007,852,658	29,439,688	2.92
1925	998,355,506	28,913,217	2.90
1926	998,180,492	28,249,320	2.83
1927	995,509,739	30,171,206	3.03
1928	991,576,496	30,191,446	3.04
1929	997,701,484	29,747,616	2.98
1930	998,981,981	30,397,793	3.04
1931	880,432,053	27,957,827	3.18
1932	569,330,822	22,529,106	3.96
1933	519,367,483	21,479,674	4.14

(1) Reports of the state board of equalization and state tax commissioner of North Dakota.

(2) School poll taxes are excluded except for the years 1922 and 1924 when they were not separately given in published reports. Road poll tax law was repealed in 1931, but road polls are included in above tabulation for years prior to 1930 as they were not separately reported. All poll taxes and special property taxes are excluded for the years 1930 to 1933 inclusive.

343 Defts. Ex. Z.

B. M.

Table — 34 — (L. A. Baker)

Estimated Property Tax Burden on Farm Lands and Farm Personalty
1920 — 1933

School poll taxes, motor vehicle license taxes and gasoline taxes have not been included. State and federal income taxes have not been included. The tax burden on farm owners and operators in this table is measured by taxes imposed on property used in the business of farming and on farm household goods, clothing, etc.

Year	Taxable value of farm lands & farm personalty (1)	Average tax rate on all property (2)	Average tax rate on farm property. (87% of previous column) (3)	Tax burden on farm property
1920	$1,106,155,799	1.98%	1.72%	$19,025,880
1921	991,667,430	2.26	1.97	19,535,848
1922	945,770,774	2.32	2.02	19,104,570
1923	758,768,331	2.74	2.38	18,058,686
1924	711,484,824	2.92	2.54	18,071,715
1925	690,148,051	2.90	2.52	17,391,731
1926	688,915,038	2.83	2.46	16,947,310
1927	681,885,033	3.03	2.64	18,001,765
1928	681,759,498	3.04	2.64	17,998,451
1929	678,633,060	2.98	2.59	17,576,596
1930	677,333,899	3.04	2.65	17,949,348
1931	571,035,778	3.18	2.77	15,817,691
1932	376,379,143	3.96	3.45	12,985,080
1933	335,828,586	4.14	3.60	12,089,829

(1) Taxable value of farm lands as reported in published reports of state board of equalization. Taxable value of farm personalty derived from abstract of tax lists reports of county auditors to state tax commissioner. Taxable value of farm personalty for years 1924 to 1929 inclusive is partly estimated as abstract of tax lists reports of county auditors were destroyed when the State Capitol burned in 1930.

(2) Average tax rate on all property derived from published data contained in reports of state board of equalization.

(3) Average tax rate on farm property in several exhaustive investigations for different years was found to be 87% of the state average. This ratio has been used as the basis of the above estimate. Original data in connection with said investigations was destroyed when the State Capitol burned in 1930. The average tax rate on farm property in above table is considered to be sufficiently accurate to derive a true picture of the tax burden of the farmer on farm property for the years given.

344 Defts. Ex. Z-1.

B. M.

Table — 35 — (L. A. Baker)

Comparison of Gross Income From Agriculture and Livestock Production in North Dakota With Taxes Levied on Farm Property 1924–1932

Year	Gross income from agriculture and livestock production	Taxes on farm lands and farm personalty	Ratio	Index of gross farm income — 1924 = 100%
1924	$ 300,506,000	$ 18,071,715	6.01%	100%
1925	274,952,000	17,391,731	6.33	92
1926	209,132,000	16,947,310	8.10	70
1927	268,535,000	18,001,765	6.70	89
1928	249,585,000	17,998,451	7.21	83
1929	211,942,000	17,576,596	8.29	71
1930	147,931,000	17,949,348	12.13	49
1931	72,716,000	15,817,691	21.75	24
1932	71,364,000	12,985,080	18.20	24

Comparison of Cash Income From Agriculture and Livestock Production in North Dakota With Taxes Levied on Farm Property 1924–1932

Year	Cash income from agriculture and livestock production	Taxes on farm lands and farm personalty	Ratio	Indices–1924=100%	
				Cash farm income	Taxes
1924	$ 279,900,000	$ 18,071,715	6.46%	100%	100%
1925	250,646,000	17,391,731	6.94	90	96
1926	185,009,000	16,947,310	9.16	66	94
1927	245,719,000	18,001,765	7.33	88	100
1928	227,810,000	17,998,451	7.90	81	100
1929	189,748,000	17,576,596	9.26	68	97
1930	129,184,000	17,949,348	13.89	46	99
1931	59,622,000	15,817,691	26.53	21	88
1932	60,626,000	12,985,080	21.42	22	72

Comparison of Gross Operating Revenues of The Great Northern Railway Company in North Dakota With Taxes Levied on Operating Property 1924–1933.

Year	Gross operating revenues	Taxes levied on operating property	Ratio	Indices–1924=100%	
				Gross operating revenues	Taxes
1924	$ 19,399,759	$ 1,717,549	8.85%	100%	100%
1925	20,709,272	1,720,111	8.31	107	100
1926	21,169,076	1,686,104	7.96	109	98
1927	21,972,497	1,759,647	8.01	113	102
1928	24,894,745	1,781,732	6.84	128	104
1929	22,523,436	1,745,785	7.75	116	102
1930	18,681,284	1,796,399	9.62	96	105
1931	13,881,026	1,828,860	13.18	72	106
1932	10,501,981	1,445,594	13.76	54	84
1933	11,767,233	1,508,352	12.82	61	88

345 Defendant's Exhibit Z-2.

To the State Board of Equalization, State of North Dakota:

Statement on Behalf of Great Northern Railway Company in the Matter of Assessment of Railroad Property for the Year 1933.

We find by reference to published proceedings of the North Dakota State Board of Equalization that for the year 1923 the assessed valuation of the Great Northern operating property amounted to 5.68% of the total assessed valuation of all property in the state. Because of reductions allowed in the assessed valuation of other property, without a corresponding reduction in the assessed valuation of the Great Northern Railway Company, this company's proportion of the total assessed valuation has not been less than for the year 1923, but has been constantly increasing, until for the year 1932 the Great Northern assessed valuation was 6.93% of the total assessed valuation of all property in the state. This is an increase of 22% in this company's proportion of the total for the state.

We further find by comparison of 1932 assessments with 1930 assessments that the total assessed valuation of all property in the state, except Great Northern, decreased 15.36%,

that the total assessed valuation of all railroads de-
346 creased 11.47%, and that for the same period the Great Northern assessed valuation was reduced only 5.34%. In other words, the Great Northern assessment since 1930 was reduced about one-half the percentage the total for all railroads was reduced and only one-third as much as the total assessed valuation of all property in the state, except Great Northern, was reduced. It, therefore, clearly appears that the railroads, and especially the Great Northern, have been compelled to carry an increased load because of the greater reductions in assessed valuations allowed other property than has been allowed the Great Northern and the other railroads.

It is difficult to understand how so small a reduction as has been allowed the Great Northern in the past two years can be justified, when all factors usually employed to determine the value of railroad property for taxation indicate a decrease of not less than 25%, and many factors indicate a decrease in value of more than 50%.

We protest and contend that the Great Northern 1932 assessment was excessive as compared with the assessment of other property, and that said assessment was greatly in excess of the value which may be fairly assigned to the State of North Dakota by consideration of system value and
347 allocation to the state by methods usually employed to determine the value of railroad properties for taxation. Every factor or index of value clearly shows that the value of the Great Northern Railroad on date of assessment this year was less than it was a year ago.

Month after month for more than three and a half years the monthly reports of this company to the Interstate Commerce Commission have shown that gross revenues were materially less than for the corresponding month in the previous year. A railway company which must depend for its existence upon the revenue it receives can not long survive such conditions.

This company's Gross Operating Revenues for the year 1930 amounted to $104,996,076. This amount is from $5,000,000 to $20,000,000 less than the gross revenue for any year since 1922. However, this company's gross revenue for 1932 was only $55,549,246, or $49,446,830 less than for the year 1930. This is a decrease in gross revenue during the past two years of over 47%.

The Net Railway Operating Income for 1930 was $21,912,508. This amount is from 10% to 30% less than for any

year since 1922, but the Net Railway Operating Income for 1932 was only $1,290,551, or $20,621,957 less than for the year 1930. This is a decrease in net income during the past two years of 94%. In other words, the 1932 net income is less than 6% of the 1930 net income.

348 The average market value of the capital stock and bonds of this company for the year 1932 was 48% less than for the year 1930.

Railroad values in 1930 had fallen to a point far below values for prior years, but let us note what has happened during the past year and make a few comparisons for the year 1932 with 1931.

The Gross Operating Revenues of this company decreased 20%.

The Net Railway Operating Income decreased 90%.

The total market value of the Great Northern Stocks and Bonds decreased 35%.

The annual report of this company shows that the net income for 1932 from all sources resulted in a deficit of $13,404,439. In other words, the Great Northern last year failed by over $13,000,000 to earn enough to pay taxes and interest on bonds. No dividends have been paid on Great Northern stocks since 1931.

The decrease in value of the Great Northern Railroad as indicated by stock market quotations, net income, or any other measure of value, has been so great that any estimate of value computed by use of five year averages is
349 grossly excessive when compared with the same computations for a shorter period.

However, we present herewith Table I, which shows the market value of the Great Northern stocks and bonds at the average market price for the five year period 1928-1932 amounted to the sum of $513,982,795. This amount was computed at the average of high and low prices for each month in the period. The amount deducted for value of securities of other companies is the total of the non-operating assets set forth in detail under Table IV, page 7 of the report to the North Dakota Tax Commissioner. Making allowance for non-operating assets leaves as the stock and bond value of the operating property the amount $337,834,809.

This statement also shows the average Net Railway Operating Income for the five year period capitalized at the rate of 6%, which produces a system value by this method

in the amount $332,080,233. The average of these two amounts is $334,957,521. Please note that the amount by stock and bond method is greater than the amount by capitalization of income, and that the average of the two amounts is over $2,900,000 greater than the amount obtained by capitalization of income.

This statement shows the proportion of the system value assigned to the State of North Dakota by use of the
350 composite ratio which gives equal weight to each of the four factors: Mileage All Tracks Operated, Car and Locomotive Mileage, Revenue Traffic Units and Gross Operating Revenues. The North Dakota proportion of the average system value computed as herein set forth is $64,814,280. This amount is $14,035,744 less than the assessed value of this company's property for the year 1932.

This statement further shows North Dakota's proportion of the system value by use of the composite ratio which gives equal weight to the three factors: Car and Locomotive Mileage, Revenue Traffic Unit and Gross Operating Revenues. This three factor composite ratio was used as the proper ratio for allocation of system value in recent railway tax cases in North and South Dakota. North Dakota's proportion by the three factor ratio, 19.14%, is $64,110,870, as clearly set forth in Table I. This amount is $14,739,154 less than the assessed valuation of this company's property for the year 1932.

Table II, hereto attached, shows the amounts for the three year period 1930-1932 computed in the same manner as Table I, except that the value of securities of other companies was computed by capitalization at the rate of 6%, the average annual interest and dividends received from
351 such securities during the past three years. The actual value of all of the securities of other companies owned by the Great Northern is undoubtedly greater than the amount so computed, for the reason that this method does not assign any value to stocks and bonds which did not pay any dividends or interest during the period considered. This low estimate of the value of non-operating assets leaves a larger amount as the value of the operating property. Making allowance for non-operating assets at the conservative amounts computed as above set forth, leaves by the stock and bond method the amount $285,498,752.

This statement, Table II, also shows the average Net Railway Operating Income for the past three years, capitalized at the rate of 6%, which produces a system value by this method in the amount of $199,291,550.

The average of the two system values as above computed is $242,395,151.

We again direct attention to the fact that the amount by stock and bond method is greater than the amount by capitalization of income and the average of the two amounts is over $43,000,000 greater than the amount obtained by capitalization of income.

352 North Dakota's proportion of the average system value by use of the four factor composite ratio, 19.35%, is $46,903,462, and by use of the three factor ratio, 19.14%, gives North Dakota $46,394,432. Both of these computed values are more than $30,000,000 less than this company's property was assessed for the year 1932, and clearly indicate that the Great Northern is justly entitled to a reduction of more than 40% below the assessment of its property for the year 1932.

To further show the great decrease in the value of the operating property of the Great Northern Railway Company, we have prepared, and submit herewith, Table III, which shows the computations from date for the single year 1932 computed in the same manner as Table II. The computed value for North Dakota by use of the figure for the single year 1932 is less than $25,000,000, which amount is less than one-third of the assessed valuation of this company's property for the year 1932.

We again direct attention to the fact that the amounts stated in these tabulations are materially greater than could be obtained by the single method of capitalization of net railway operating income.

Another method of allocation of system value to the several states is suggested by the data called for under
353 Table IX, page 15, of the railway company's report to the North Dakota Tax Commissioner. This method is referred to by various names, such as Physical Property, Interstate Commerce Commission Valuation plus Additions and Betterments, Cost of Reproduction New, or Cost of Reproduction less Depreciation.

The Great Northern report shows North Dakota's proportion of the Interstate Commerce Commission valuation plus additions and betterments, without any allowance for depreciation, is 14.32% of the total for the system. This percentage is less than any figure we have used in the composite ratios for allocation, so that to use this method alone or in combination with any or all of the other factors would re-

duce the amounts we have set forth in our computations as the proportion of the system value assignable to North Dakota.

Let us briefly review the results of the computations which we have set forth in detail:

The computed valuation for North Dakota by use of five year average, Table I, is $64,814,280

The computed valuation for North Dakota by use of the averages for the past three years, Table II, is $46,903,462

The computed valuation for North Dakota by capitalization of net railway operating income and market value of stocks and bonds for the past year, Table III, is $24,733,390

354 We respectfully submit that this company is justly entitled to a reduction in its assessment for 1932, and urgently request that the Great Northern assessment be fixed at an amount not in excess of $60,000,000.

Respectfully submitted,

GREAT NORTHERN RAILWAY COMPANY,
By W. L. Schoettler,
Assistant Right of Way, Land & Tax Commissioner.

James T. Maher,
Right of Way, Land &
Tax Commissioner.

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355 Table I.

Great Northern Railway Company
North Dakota

1933

Average Market Value for the Five Year period ending December 31, 1932	
Stock,	$173,854,616
Bonds,	340,128,179
Total Table III Report to Tax Commissioner,	$513,982,795
Non-Operating Assets—Table IV	176,147,986
Stock and Bond Value of Operating Property	$337,834,809

Capitalization 5 Year Average Net Railway Operating Income at 6% — 332,080,233

Average System Value, — 334,957,521

North Dakota's Proportion:

1. Mileage All Tracks	(1932)	19.96%	
2. Car & Locomotive Mileage	(5 yr. Av.)	20.04	
3. Revenue Traffic Units	(5 yr. Av.)	18.93	
4. Gross Operating Revenues	(5 yr. Av.)	18.45	
Average 1, 2, 3 and 4	(A)	19.35%	- $ 64,814,280
" 2, 3 and 4	(B)	19.14%	- 64,110,870

Assessed Valuation - 1932 — $78,850,024

Assessed Valuation in Excess of Computed Value (A) — $ 14,035,744
" " " " " " " " (B) — 14,739,154

Tax Division
St. Paul, Minnesota.
July - 1933.

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Table II.

Great Northern Railway Company
North Dakota

1933.

Average Market Value of the Three Year Period Ending December 31, 1932

Stock,		$116,649,234
Bonds,		385,373,407
Total as Reported to Oregon Tax Commission		$442,022,641

Less Deductions for Non-Operating Assets
Interest and Dividends from Securities of Other Companies including C. B. & Q. Stock
1930 - $13,600,243
1931 - 10,063,971
1932 - 3,340,085

Average - $ 9,001,433
Capitalized at 6% — $130,023,889

Land Grant Lands — 1,000,000

Locally Assessed Property — 5,500,000 — 156,523,889

Stock and Bond Valuation Operating Property, — $285,498,752

Capitalization Net Railway Operating Income 1930-1932 Average $11,957,493 Capitalized at 6%		199,291,550
Average System Value,		$242,395,151
North Dakota Proportion (A)	19.35% - - -	$ 46,903,462
(B)	19.14% - - -	46,394,432
Assessed Valuation - 1932	$78,850,024	
Assessed Valuation in Excess of Computed Value (A)		$ 31,946,562
" " " " " " " (B)		32,455,592

Tax Division
St. Paul, Minnesota.
July - 1933.

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Table III.

Great Northern Railway Company
North Dakota

1933

Average Market Value for the Year ending December 31, 1932		
Stock,		$ 32,830,915
Bonds,		263,470,262
		$296,301,177
Less Deductions for Non-Operating Assets Interest and Dividends from Securities of Other Companies including C. B. & Q. Stock 1932 - $3,340,085 Capitalized at 6%	$55,668,083	
Land Grant Lands,	1,000,000	
Locally Assessed Property,	5,500,000	62,168,083
Stock and Bond Valuation Operating Property		$234,133,094
Capitalization Net Railway Operating Income 1932 - $1,290,551 Capitalized at 6%		$ 21,509,183
Average System Value,		$127,821,139
North Dakota Proportion (A)	19.35% - - - -	$ 24,733,390
(B)	19.14% - - - -	24,464,966
Assessed Valuation - 1932	$78,850,024	

Assessed Valuation in Excess of Computed Value (A) $ 54,116,634
" " " " " " " (B) 54,385,058

Tax Division
St. Paul, Minnesota.
July - 1933.

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358 Stipulation Approving Statement of Evidence.

It Is Hereby Stipulated And Agreed that the foregoing statement consisting of 217 typewritten pages together with plaintiff's exhibits 1 to 23, inclusive, and defendants' exhibits A to Z and Z-1 and Z-2, inclusive, may be accepted, assigned, settled and allowed as the Statement of Evidence in the above entitled matter and that the same includes all the evidence offered and received at the trial and the proceedings, objections, rulings and exceptions made, taken and rendered on the trial of said cause and that the same may be settled by the court as the Statement of Evidence herein.

C. J. MURPHY,
T. A. TONER,
Solicitors for Plaintiff.

P. O. SATHRE,
HAROLD SHAFT,
Solicitors for Defendants.

Dated this 4th day of January, 1935.

Endorsed on the face as follows: "Filed Jan. 5, 1935, J. A. Montgomery, Clerk."

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359 Order Approving Statement of Evidence.

Upon the foregoing stipulation, the foregoing statement consisting of 217 typewritten pages, together with plaintiff's exhibits 1 to 23, inclusive, and defendants' exhibits A to Z, inclusive, and Z-1 and Z-2, is hereby settled and allowed as a full, true and complete transcript of all the evidence introduced at the trial of the above entitled cause, and includes all the objections, rulings, exceptions and proceedings had and taken at the trial of said cause, and the same is hereby duly allowed as the Statement of Evidence herein.

Dated at Fargo, N. D., this 5th day of January, 1935.

ANDREW MILLER,
Judge of the United States District Court for the District of North Dakota.

Endorsed on the face as follows: "Filed Jan. 5, 1935. J. A. Montgomery, Clerk."

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360 Stipulation as to Contents of Transcript of Record.

It Is Hereby Stipulated And Agreed by and between the solicitors for the respective parties that the Transcript of Record to be filed in the Circuit Court of Appeals for the Eighth Circuit, pursuant to the appeal heretofore allowed herein shall include the following:

(1) Subpoena in chancery; but the various returns thereto may be omitted and in lieu thereof the Clerk may incorporate an appropriate memorandum showing that proper service was made.

(2) Bill of Complaint.

(3) Answer to Bill of Complaint.

(3-a) Record of Trial.

(4) Statement of Evidence.

(5) Plaintiff's Exhibits 1 to 23, inclusive, and Defendants' Exhibits A to Z, inclusive, and Z-1 and Z-2.

(6) Findings of Fact and Conclusions of Law.

(6-a) Proposed Findings of Fact and Conclusions of Law.

(7) Decree.

(8) Petition for Appeal.

(9) Assignment of Errors.

(10) Order Allowing Appeal.

(11) Citation on Appeal with service thereon.

(12) Bond on Appeal with the Court's approval thereon.

(13) Order Extending Time in which to perfect appeal.

(14) This stipulation.

Dated this 4th day of January, 1935.

C. J. MURPHY,
T. A. TONER,
Solicitors for Plaintiff.

P. O. SATHRE,
HAROLD SHAFT,
Solicitors for Defendants.

Endorsed on the face as follows: "Filed Jan. 5, 1935. J. A. Montgomery, Clerk."

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361 Citation on Appeal.

Filed Nov. 8, 1934. J. A. Montgomery, Clerk.

Great Northern Railway Company, Plaintiff,

vs.

J. J. Weeks, State Tax Commissioner, J. M. Baillie as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor and W. D. Conway as Treasurer of Benson County; Ole Colbornson as Auditor and Sam H. Wilson as Treasurer of Bottineau County; H. F. Magedanz as Auditor and Jerry Donovan as Treasurer of Burke County; F. Ford Doherty as Auditor and C. A. Baumgartner as Treasurer of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor and H. J. Oberman as Treasurer of Dickey County; R. H. Lynch as Auditor and O. A. Steffler as Treasurer of Divide County; S. W. Lyman as Auditor and Hugh Peoples as Treasurer of Eddy County; J. B. McWethy as Auditor and M. P. Roberts as Treasurer of Foster County; Martin O. Haugen as Auditor and John Sandbek as Treasurer of Grand Forks County; P. A. Melgard as Auditor and R. J. Howden as Treasurer of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor and Oluf Erickson as Treasurer of McKenzie County; F. J. Haines as Auditor, and Nels Hofland as Treasurer of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor and J. H. Hannesson as Treasurer of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor and W. C. Budke as Treasurer of Renville County; George J. Fischer as Auditor and Karl L. Mikkelson as Treasurer of Richland County; Jas. H. Penny as Auditor and Allister McKay as Treasurer of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. H. Mustad as Auditor and Florence Carlson as Treasurer of Steele Coun-

ty; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortensen as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota, Defendants.

United States of America—ss.

To the Above Named Defendants—Greeting:

362 You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, State of Missouri, within forty days from the date hereof pursuant to an order allowing the appeal from the District Court of the United States for the District of North Dakota in a suit wherein Great Northern Railway Company is appellant and you are appellees to show cause, if any there be, why the decree rendered against said Great Northern Railway Company should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Andrew Miller, Judge of the District Court of the United States this 8th day of November, 1934.

ANDREW MILLER,
Judge for the District Court, for the District of North Dakota.

Service of a copy of the foregoing citation is acknowledged this 8 day of November, 1934.

P. O. SATHRE,
Atty. General,
Solicitor for Defendant.

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363 (Clerk's Certificate to Transcript.)

United States District Court,
District of North Dakota—ss.

I, J. A. Montgomery, Clerk of the United States District Court for the District of North Dakota, do hereby certify

that the foregoing pages, from 1 to 362, both inclusive, contain true and faithful transcripts of all pleadings, process and proceedings of record and on file in my office as said Clerk, and the whole thereof, and the endorsements thereon, as designated by a stipulation on file, in the case of "Great Northern Railway Company, a corporation, Plaintiff, versus J. J. Weeks, et al., Defendants."

Witness my hand and the seal of said Court, at Fargo, in said District, this 7th day of January, A. D. 1935.

(Seal)
U. S. Dist. Court
Dist. of No. Dak.

J. A. MONTGOMERY, Clerk,
By E. A. Steele, Deputy.

Filed Jan. 10, 1935. E. E. Koch, Clerk.

[fol. 308] Appearances of counsel omitted in printing.

[fol. 309] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

ORDER OF SUBMISSION—March 14, 1935

This cause having been called for hearing in its regular order, argument was commenced by Mr. F. G. Dorety for appellant, continued by Mr. Harold D. Shaft for appellees, and concluded by Mr. F. G. Dorety for appellant.

Thereupon this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 310] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

March Term, A. D. 1935

No. 10,221

GREAT NORTHERN RAILWAY COMPANY, Appellant,

vs.

J. J. WEEKS, State Tax Commissioner, et al., Appellees

Appeal from the District Court of the United States for the District of North Dakota

Before Stone, Sanborn and Faris, Circuit Judges

Mr. F. G. Dorety (Mr. C. J. Murphy was with him on the brief), for appellant.

Mr. Harold D. Shaft (Mr. P. O. Sathre was with him on the brief), for appellees.

OPINION—April 25, 1935

STONE, Circuit Judge, delivered the opinion of the court:

The Board of Equalization of the State of North Dakota made an assessment of the property of appellant in August,

1933, under statutes requiring such assessments to be at the "true and full value in money". The result of this assessment was allocated to the various counties containing mileage of the railway and such allocated amounts were certified to the auditors and treasurers of such counties. Appellant filed this suit in the District Court for the Dis- [fol. 311] trict of North Dakota against the State Tax Commissioner and the auditors and treasurers of these several counties whereby it sought to enjoin the collection of forty-three per cent of the taxes based upon such assessment on the ground that the assessment was invalidly excessive to that extent. Appellant paid something more than the amount of taxes it deemed to be due; issues as to the validity of the assessment were joined; a full hearing was had; and the court made findings and entered a decree dismissing the bill for want of equity. From such decree this appeal is brought.

Appellant presents here two main contentions. Both of them are based on the proposition that the assessment is grossly excessive. The first contention is that this excess is caused by including within the assessment property outside of the State of North Dakota. The second is that the excess was occasioned by the arbitrary action of the Board.

I. Out-state Property

Not every excessive State assessment of property which is a part of interstate property permits the issue that the assessment results in taxation of out-State property. That issue is open only where it is established that the assessment value was reached by the use of certain methods or formulae and that such use has resulted in inclusion of out-State property. Such methods and formulae are those having to do with allocation of State value from system value. Two successive steps are thus involved in such a contention: first, establishment that certain methods or formulae were used by the assessing officials; second, that the use of such methods or formulae resulted in the inclusion of out-State property in the value assessed within the State.

The trial court expressly found:

"That at no time within the past ten years has the State Board of Equalization adopted any specific or definite for-

mula or method of calculating the value of the railroads operating in the state of North Dakota, but the State Board of Equalization has at all times had before it, at the time of making such assessments, tables and formulas prepared by the railroads and the office of the Tax Commissioner of the state, and has considered the same in arriving at its assessments, but never has adopted the exact result of any [fol. 312] of said tables, formulas or methods of computation of railroad valuations."

If this finding is sustained by the evidence, there is no basis for the issue that out-State property is included in the assessment.

Appellant's contention is that the State Board made no independant determination of assessment for 1933 but merely adopted the assessment of 1932; that the assessment for 1932 was determined according to a definite method; that such method was as follows:

"the state taxing authorities first determined a value for the entire railroad system including the property located in other states. They capitalized the average net annual earnings of the entire railroad property for the five year period ending with the year preceding the assessment at the rate of 6% to determine an earnings value of the system. They then determined the average total market price of appellant's outstanding securities (stocks and bonds) for the same period, thus obtaining a total market price of these securities, which represented ownership not only of the railroad property but also of all other assets of the appellant not forming any part of its railroad and subject to local taxation in other jurisdictions. They then apportioned a part of this total securities price to the railroad property alone, this apportionment being made one-half in proportion to relative cost or investment, and one-half in proportion to the respective net earnings of the railroad and non-railroad properties. Having thus determined a 'stock and bond' value for the railroad property alone, they averaged this 'stock and bond' value with the 'earnings' value obtained as above stated, thus determining a system value of the railroad property as of the date of assessment. Of course, this system value included all of the railroad properties of the Great Northern in all of the eight states."

"They then attempted to allocate a portion of this system value to the state of North Dakota upon a composite allocation factor which included the following proportions: 'miles of all track' (single year), 'car and locomotive miles' (five year average), 'ton and passenger miles' (five year average), 'gross revenues earned' (five year average), and 'physical property' (single year). In the 'gross revenues' attributed to the state of North Dakota were included a proportion of the gross revenue on each interstate shipment or [fol. 313] trip performed in any part in North Dakota, equal to the proportion of road miles in North Dakota to the total road miles traversed by that particular shipment. The amount of physical property in North Dakota and on the system was measured by estimated cost of reproduction less depreciation. An average of these five factors was applied to the system value to produce a value for North Dakota, and the State Board of Equalization then adopted a 'judgment' figure approximating but not conforming identically to it."

Appellant contends that the answer does not deny and therefore admits that the above method (pleaded in the complaint) was the one used by the Board. The answer very clearly denies that such method was the sole basis of the Board's determination. In several places in the answer it appears that, in reaching its conclusion in 1933 and prior years, the Board had before it computations based on the above five elements and on various combinations of those elements and:

"that upon this evidence and upon all other evidence and matters of common knowledge before it the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024.00.

"Defendants further allege that in the year 1933 the State Tax Commissioner and the plaintiff did present to the State Board of Equalization the financial and operating statistics of the plaintiff's railroad and reports and computations based upon the formulas used in 1932 and other evidence of value, and that the Board of Equalization after full consideration of said statistics, computations, reports, and all other evidence of value and matters of common knowledge, did fix the assessment of plaintiff's property in North Dakota for the year 1933 at $78,832,888.00, which said amount

represented the honest judgment of the State Board of Equalization and the true and full value of the plaintiff's North Dakota property in money.'"*

[fol. 314] These pleadings definitely presented the issue as to what extent the Board used the method declared in the petition or any other method. This leaves the solution of the issue to the evidence.

In its brief appellant states:

"While the Board of Equalization did not adopt this computation exactly but also considered computations made by the use of only a portion of the five allocation factors mentioned above (which produced even higher results for North Dakota), and also 'other evidence and matters of common knowledge' (T. 27), the assessment which it adopted approximated all of these computations and was slightly in excess of the computation produced by the five factor ratio which the state alleges to be the fairest one. It seems fair to conclude, therefore, that the method outlined above was the basis upon which the assessment was made, or at least that any errors which we can point out in the method described above are reflected in the assessment, in somewhat exaggerated form."

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*Other allegations in the answer are as follows:

"That the law above stated applies to the State Board of Equalization as well as assessors. The State Board of Equalization is thereby [Section 2122, Supplement to Compiled Laws of North Dakota, 1913-1925] required to exercise its best judgment and discretion as to the assessment of operating property of railroad companies and is required to assess such property at such amount as the Board believes such property to be fairly worth in money. Said law does not permit the State Board of Equalization to substitute for statutory and constitutional provisions, requiring the Board to exercise its judgment and discretion as to value, any arbitrary formula, method or rule based upon operating and financial statistics of railroads.

* * * * * * *

"The State Board of Equalization of the State of North Dakota and the taxing authorities of other states have used

From this quotation, it is clear that the proof of the fact that the Board used the above five factor method is based on the conclusions that because the Board's assessments for several years before 1933 were not far from what would have resulted by the use of that method and because the as- [fol. 315] sessment of 1933 was the same as for 1932, it must follow that such method was carried into the 1933 assessment. But the 1933 assessment is appreciably above the result which would have been reached by applying such method. No member of the Board was a witness. No witness pretended to know all that the Board might have considered. Witness Baker (who had nothing to do with this 1933 assessment but who was, until January, 1933, deputy Tax Commissioner for North Dakota and who prepared valuation data for the Tax Commissioner to present to the Board up to the time), testified as follows:

"The State Board of Equalization in North Dakota in deliberating on railroad assessments considered the evidences of value as presented in the briefs of the railroad companies and the evidences of value as shown in exhibits prepared by the Tax Department for their use and just what their final conclusions as to the assessments were, were, I believe, based

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and considered said formulas based upon the operating and financial statistics of railroads as evidence of the value of railroads but not as the exclusive source of evidence of value.

* * * * * * *

"Defendants allege that the State Board of Equalization pursuant to its constitutional and statutory duty considered the financial and operating statistics of the plaintiff and the computations of value based upon the accepted formulas together with all other evidence before it and matters of common knowledge including the conditions of the times and from all such evidence arrived at the assessment herein complained of as its honest judgment as to the full and true value of the plaintiff's property in North Dakota in money.

* * * * * * *

"Defendants further allege that all of the statistics, formulas and computations and all other evidence and mat-

upon their judgment in part and in part upon what the statistical data that they considered indicated.

* * * * * *

"The formulas that I have used in this case to a great extent are the ordinary and usual formulæ that have been given recognition either by the courts or are in general use by taxing bodies, and the State Board of Equalization gave such weight to the data as the Tax Commissioner presented to the Board as in their judgment it was entitled to. I cannot give any testimony as to just what weight was given to the evidence presented to them. There were two classes of evidence, that presented by the Tax Commissioner and that presented by the Railway Company.

* * * * * *

"In presenting these exhibits and tables, it has not been my intention to state that any of these formulæ produced a true valuation of the Great Northern Railway. My purpose has been to show that by the use of most any formula

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ters of common knowledge were considered by the Board in arriving at its 1933 assessment.

* * * * * *

"Answering Paragraph XVIII of plaintiff's complaint, defendants deny that the Board of Equalization deliberately, intentionally, or knowingly over-valued or over-assessed plaintiff's property or ignored any of the facts, figures or computations material to a determination of the value of plaintiff's property, and deny that any value of property located in other states was assessed in North Dakota, and deny that the board acted without logical processes of reasoning or basis of fact, and deny that said assessment was made arbitrarily, fraudulently or excessively and on the contrary these defendants allege that said assessment for 1933, and for all prior years, was made after full and fair consideration of all the facts herein set forth and of all other facts material to a determination of the value of plaintiff's railroad and that the assessment made in 1933 represented the honest, fair, and just determination of the Board of Equalization.

"Defendants allege that under the recognized, accepted and usual methods of ascertaining railroad values, the as-

that has been given any recognition the assessment in the four years immediately preceding 1933 could be justified and then I have shown what results were produced for the year 1933 by each method.

As to my statement that the excess in the 1933 assessment over the results produced by any of these tables operated [fol. 316] to some extent to condemn the 1933 assessment, I will say that the very best statistical evidence of value are not definite proof of value and there were a number of peculiar and extraordinary circumstances for the Board to consider in 1933 that are not in any way indicated by statistical exhibits. I do not feel that variance from the results produced by my table present an absolute showing of a wrongful assessment on the part of the State Board.

"When I say that the State Board of Equalization had unusual facts and circumstances before it in 1933, I refer to two different things, first, the general economic situation, not only in the United States, but particularly in the State of North Dakota, with an almost total collapse in the value of all property and with almost a total collapse in the income producing ability of property not only in North Dakota but generally; and the second matter to which I refer was the fact that in 1932 the people of North Dakota by an initiated law changed the tax base from 75% of full

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sessment for the year 1929 was approximately 100% of full and true value, for 1930 was approximately 96% of full and true value, for 1931 was approximately 96.5% of full and true value, and for 1932 was 100.3% of full and true value, and that the apparent over-assessment for the year 1933, if computed strictly upon the aribtrary formulas hereinbefore referred to is occasioned by the fact that the application of the arbitrary formulas hereinbefore referred to had lost most of their evidentiary value by reason of the panic conditions existing in 1933 as hereinbefore referred to, and that in order to arrive at any honest, fair, or just determination of the value of plaintiff's property in 1933 it was necessary to add to the results produced by such arbitrary formula large amounts in order to compensate for the artificially and unnaturally low prices of stocks and bonds as hereinbefore alleged, and for the temporary effect upon plaintiff's net earnings of the collapse of business generally throughout the world."

value to 50% of full value. Due to the various tax limitation laws limiting the tax levies of all classes of taxing districts this handicapped the various equalization boards and particularly the State Board of Equalization in reducing property values down to correspond to some extent to the drop in income and corresponding to the actual loss in value which had occurred. The tax base had been more than cut in two in a few years. In 1923 the tax base on a 75% valuation was approximately a billion and eighty-nine million. This had gradually shrunk and then was decreased by one-third in 1932 by reasons of the initiated law, and the various taxing districts, counties and school districts, (to a very large extent, were unable to levy sufficient revenue under the new tax base to meet ordinary running expenses.

"Referring to my statement that in computing the stock and bond values of the railroad, the state of the market during the portion of the year 1933 preceding the meeting of the Board of Equalization had not been taken into consideration, I will say that the three months preceding the date of the assessment or four months, showed a tremendous upward trend in the stock and bond market and we were in the middle of a boom during the months of May, June and July. When I speak of the stock and bond market, I include all stocks and bonds. There was a very sharp rise in Great Northern stock. I don't recall the extent of that rise."

[fol. 317] No other witness pretended to say what method or methods the Board had used or to what extent it had used any of them. We think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method and, therefore, is in no position to urge the contention that property outside the State has been brought into this assessment.

Even had appellant shown such reliance by the Board upon the five factor method, it would be in no position to take advantage of such in connection with this contention. The force of its attack upon that method is based upon the argument that, in the situation here, the only approximately true method of allocation was one using the comparative "expense of operation" in North Dakota and outside of that State or upon the system. Appellant presented the five factor method to the Board. It is undisputed that no

such method as now advanced was ever presented to the Board in this matter or in any other. In fact, this method has never been used by any railroad or tax commission so far as any of the witnesses knew and it was prepared subsequent to the making of this assessment. Certainly, this assessment should not be overthrown for a reason which the Board never heard of. More strongly is that true when (as shown by this evidence) there is grave doubt as to the verity and usefulness of the method now advanced.

II. Arbitrary Assessment

This contention is that even if the method of allocation of State value from system value is defensible and no out-State property has been included in the assessment, yet the Board has valued the property of appellant within the State "at a grossly excessive result by wholly arbitrary methods." The position of appellant is expressed in the brief thus:

"We believe that the excessiveness of the assessment coupled with the fact that the value was not computed as of that time but was adopted as of a previous year, is sufficient to condemn the assessment; but if not, we believe that the methods which were used in making the 1932 assessment make it wholly inapplicable and arbitrary for 1933."

In view of much of the argument of appellant (hereinafter to be examined), it is vital to keep in mind that not [fol. 318] only was the burden upon appellant to prove both excessive assessment and arbitrary action in reaching such result but, since this litigation involves the validity of State action, to prove such clearly and convincingly—there was no burden upon appellees to sustain the action of the Board. When the validity of State action is in controversy, it is the duty of courts to view the testimony critically from the sole standpoint of how completely and convincingly the challenger of such action has sustained his position. From this standpoint we are compelled to view this evidence.

While appellant presents its supporting argument under several headings, it is all based upon two matters: that the 1933 assessment is the same as that for 1932 and that it is excessive. From the fact that the assessments of these

two years are identical, appellant argues that no independent investigation or consideration was given to the situation existing at the time of the assessment for 1933 (August, 1933) but that the Board reached its conclusion upon the same basis, methods and facts as in 1932. The argument really is that because none of the calculations of the appellant or of the deputy Tax Commissioner justified the result reached by the Board and because the assessment was the same as in 1932, that the Board gave no weight or consideration to the situation and matters before it in 1933 and arbitrarily selected the assessment for the year 1932. No such assumption necessarily follows: It may have been true or it may not. It was for appellant clearly to establish that it was true. Appellant urges that this conclusion must be accepted because appellees did not deny these matters in the pleading nor did they meet them in the proof by placing the members of the Board on the stand and from them disclose what they actually did. Certainly there is no such admission in the answer. The issue was directly presented in the pleadings. Nor is any strength to be gained from appellees not putting the Board members on the stand. No burden of proof rested on appellees. No inference unfavorable to appellees can be drawn from such action since the Board members were, if proper witnesses, as available to the appellant as to appellees. The burden of clearly proving its case remained with appellant from the beginning. It could stop when it felt it had sufficiently established its case. If it closed before it had reached that point and has failed to introduce evidence known to exist it cannot have advantage therefrom where the evidence is open to it to produce.

[fol. 319]. The evidence reveals the following: that the Board had before it data and calculations, by various methods, presented by appellant which referred to the 1933 assessment; that in prior years, calculations by various methods prepared by the deputy Tax Commissioner had been before it; that before 1933, it had "used" the five factor method (to what extent or just how does not appear); that the assessments of former years had never tracked any of the known methods; that, measured by any of the methods, the assessments for 1929 were approximately 101%, for 1930 approximately 96%, for 1931 approximately 97% and for 1932 approximately 101%; that,

by any of the methods, the assessment for 1933 was from 115.27% to 121.72%; that since 1918, the movement of annual assessments of appellant's property by the Board had been as follows, in 1919 a reduction of 4% ($3,683,000), in 1921 a reduction of 5% ($4,332,252), practically no change until 1929 when an increase of 1.25% ($1,028,291), no appreciable change in 1930, in 1931 a reduction of $294,691, in 1932 a reduction of 5% ($4,149,973), in 1933 no change; that no formula nor combination of formulae has been found to be an accurate measure of value; that formulae are merely methods worked out to aid in solving the difficult matter of value; that there is decided difference of opinion between students of values as to the relative worth of different formulae and as to their use in different situations; that there is no evidence of any deliberately arbitrary or wrongful assessment concerning years prior to 1933; that there is no evidence of what use was made by the Board of any formula either in 1933 or prior years; that there is no evidence as to how the Board reached its results in 1933 or prior assessments.

The value of anything is, in its nature, a matter of opinion. Where the value involved is market (or sales) value, the determination of such opinion may be accurately made, where the thing to be valued is bought and sold on an active recognized market by current prices in sales on such market. Where the thing is not such as is sold on an active recognized market but is the subject of sale (such, for example, as real estate) determination of opinion as to value is rarely subject to accurate demonstration but must be the result of the judgment (of the trier of the fact of value) applied to various and usually inharmonious evidences and also expressions of expert opinion presented to it. Where [fol. 320] the thing to be valued is rarely or never the subject of sale (as here), the task of determining value reaches the limit in difficulty, complexity and uncertainty. This difficulty appears in this evidence, is expressly stated by the witnesses and it has been universally recognized by courts. The most recent judicial announcement thereof is contained in a fine, concise statement (with a wealth of citations) by Mr. Justice Butler in Rowley v. C. & N. W. Ry., 293 U. S. 102, 109, as follows:

"The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed

by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property. Boom Co. v. Patterson, 98 U. S. 403, 407, et seq. Cleveland, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 439, 445. Adams Express Co. v. Ohio, 166 U. S. 185, 220. Brooklyn City R. Co. v. New York, 199 U. S. 48, 52. Omaha v. Omaha Water Co., 218 U. S. 180, 202-203. Minnesota Rate Cases, 230 U. S. 352, 434, 454. Branson v. Bush, 251 U. S. 182, 185-188. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U. S. 276, 287. United States v. New River Collieries, 262 U. S. 341. Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 123-126. Standard Oil Co. v. Southern Pacific Co., 268 U. S. 146, 155, et seq. McCardle v. Indianapolis Water Co., 272 U. S. 400, 410, 414. Olson v. United States, 292 U. S. 246, 255, et seq. The apportionment of system value between Wyoming and the rest of the system involves the finding of the value of the portion of the railroad that is located in that State. The problem is quite like the ascertainment of the value of the whole. The determination is to be made in the exercise of a reasonable judgment based on facts so pertinent and significant as to be of controlling weight as indications of the value of the property."

Because of the character of the problem of value and the difficulty of its solution, courts have properly concluded that a determination thereof by them—on review—is no more likely to be correct than the result reached by the person or body whose action is under review. In short, they will not substitute their judgment for that of the other (Rowley v. C. & N. W. Ry., 293 U. S. 102, 111-112). Where the original determination is a legislative function (directly [fol. 321] or through administrative agencies created by the legislature for that purpose), the judicial function can operate only to keep the exercise of such legislative action within the constitutional legislative limits. Those limits are that the legislative power shall be exercised in good faith, which means an honest effort to reach a right conclusion. It is not enough to show merely that there has (in the opinion of the court) been overvaluation but it must

also be shown that such good faith effort was lacking—that there was "an intention, or the equivalent of fraudulent purpose, to disregard the fundamental principle of uniformity" (Rowley v. C. & N. W. Ry., 293 U. S. 102, 111). Moreover, this bad faith (or arbitrary action) must be clearly and convincingly shown. Here, the original determination of this value was properly committed to the Board as an administrative agency created by and acting for the legislature of the State. Without determining that overvaluation is here shown, there remains the question of arbitrary action in reaching the result.

With the above principles in mind, it is obvious that the evidence here fails to show arbitrary action upon the part of the Board. That the Board had some reason for adopting the 1933 value must be taken as true in the absence of clear proof to the contrary. Whether that reason was so flimsy or based upon methods or considerations so shadowy that the result must be held to be arbitrary we cannot conclude from the above evidence which reveals nothing of what influenced the Board to its determination.

State action through proper administrative bodies cannot be judicially overthrown upon surmises and deductions but only upon clear evidence compelling adverse judicial conclusions. It is not at all controlling that this assessment does not prove out by any of the formulae which the experts who use them admit are merely helps in determination of value and not at all definite measurements thereof. However, whether the result reached by the Board is materially out of line according to some or any of the methods ordinarily used in estimating value, depends upon choice of various factors—such as percentage employed in capitalizing earnings and the period used to determine an average of annual earnings. Here, appellant contends for a 7% rate while there is evidence that a 4% rate would have been justified under conditions existing in 1933. Also, appellant [fol. 322] contends for a three year period for averaging earnings while there is evidence that a five year period is proper and usually employed and would be particularly applicable here as it would include peak expansion and peak depression years while a three year would unduly accentuate the depression years. While value is to be here determined as of a definite time, yet no wise investor would think of buying stock or securities of a railroad without giving

consideration to its history. The investor buys because of his estimate of the future but that estimate must include the experience of the reasonably near past.

Nor is it determinative that the 1933 assessment was identical with that of 1932. The evidence shows the business depression effective in 1932 and 1933; a decided improvement in stock and bond prices (generally and as to appellant) in 1933 prior to the assessment; and a slight reduction (.35% or $294,691) in the assessment of 1931 and a substantial reduction (5% or $4,149,973) in the 1932 assessment. It also appears that it is not unusual for the Board to use approximately the same amount for successive years* It may well be, in view of this situation, that the Board might honestly deem its reduction of 1932 to have sufficiently taken care of the effect on value of the depression covering 1932 and passing into 1933—especially in view of apparent improvement in conditions in 1933. So far as we are advised there was no contest of the 1932 assessment and we do not understand that the good faith of that assessment is here questioned.

Much learning has been expended by witnesses and by counsel concerning the merits of various methods of estimating system value and of allocation of State value therefrom and also as to the applicability of such methods of allocation to the situation here. This learning is valuable, but until we know what consideration was given by the Board to any or all of these methods the matter is academic in this case.

Also it is contended that earnings of appellant were "capitalized at an arbitrary and inadequate rate per cent." The contention is that the rate should have been 7%. Such was appellant's evidence but the witness for appellees de- [fol. 323] fended 4%. The evidence shows that this is a matter of opinion depending on various influencing considerations and that competent experts on the stand had considerable to say upon both sides of the dispute. While

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* The assessments for 1919 to 1933, both inclusive, being as follows: 1919, $86,603,330; 1920, $86,599,348; 1921, $82,267,096; 1922, $82,267,047; 1923, $82,267,047; 1924, $82,266,895; 1925, $82,266,353; 1926, $82,266,220; 1927, $82,266,387; 1928, $82,266,386; 1929, $83,294,677; 1930, $83,294,688; 1931, $82,999,997; 1932, $78,850,024; 1933, $78,832,888.

we might conclude (if we determined the matter) that 7% was the best rate, this evidence would far fail in establishing that the use of 6% (or even as low as 4%) instead of 7% was clear proof of arbitrary action by the Board. This matter is one of fact not properly subject to judicial review (L. & N. R. R. Co. v. Greene, 244 U. S. 522, 542).

It is contended that no stock and bond prices of 1932 or 1933 were considered and therefore the action of the Board was arbitrary. There is no evidence that such prices were not considered. The statement to that effect is based upon assumptions drawn from the fact that this assessment was identical with that of 1932.

It is contended that the valuation included non-operating assets not located in North Dakota. The witness for appellees testified:

"The State Tax Commissioner has used a composite method of assigning a value to the operating and to the non-operating property based upon two ratios; the relative book cost of operating and non-operating property is used as one percentage figure and the relative earnings from the two classes of assets for a period of years is used as the other percentage, the two percentages are averaged and the composite percentage is applied to the total stock and bond value and the resulting amount, for instance, as to non-operating property is deducted from the total stock and bond value."

This testimony, which was all upon this matter, would seem to meet this contention and show an effort by the Board to exclude all non-operating assets. Other testimony of the same witness makes clear that he had no knowledge of what the Board considered in connection with the 1933 assessment (made July, 1933) since he had terminated his connection with the Tax Commission in January, 1933. The just above quoted testimony must have referred to the time he was familiar with the affairs of the Board, which was several months before this assessment. So construed, there is no testimony as to what the Board did in 1933 about excluding or including non-operating property.

[fol. 324] Appellant argues that its true value has been more than doubled "by the use of the arbitrary and indefensible methods above referred to"—meaning that such doubled value would result:

"If the system value of $433,241,000 which formed the basis of the 1932 assessment (and therefore of the 1933 assessment also) were first reduced to $345,188,820 (the system value computed by Mr. Baker for 1933 in Exhibit P, T. 277), and if Mr. Baker's computation in Exhibit P (which fails by 25% to support the assessment) were corrected by capitalizing earnings for three years instead of five years, and at the rate of 7% instead of 6%; and if stock and bond prices for three years were used instead of five years and apportioned between railroad property and non-operating assets in proportion to their respective five years earnings instead of by the composite ratio reflecting relative investment, the system value through these corrections would be reduced to $204,417,740 instead of $433,241,000 which formed the basis of the state's assessment."

Of course, if it were shown that the true value of appellant's property were doubled in the assessment it would be a very significant and arresting fact. However, this result is reached only by assuming the verity of all the contributing factors just above quoted and all of them are subject to grave question, some of them are disputed in the evidence and others have no foundation in the evidence. We do not mean to say that an assessment might not be so grossly excessive, under all the circumstances shown by the evidence, that it would, if unexplained, be sufficient proof of fraud. There are cases, relied on by appellees, which seem to state that excessiveness, alone and for a single assessment, is not enough but that the fraud must be a consistent or systematic practice (Cumberland Coal Co. v. Board, 284 U. S. 23, 28-29; Chicago, G. W. Ry. v. Kendall, 266 U. S. 94, 96; Southern Ry. Co. v. Watts, 260 U. S. 519, 526). We hesitate to construe those and other like cases to mean that in no event can bare excessiveness constitute sufficient evidence of fraud to invalidate a particular and single assessment. We rather incline to the view that a bare showing of excessive assessment or of discrimination in assessments is not sufficient to prove fraud but that if such excessiveness or discrimination be so gross and glaring as, under all of the evidence, to challenge the conscience of the court, it may be found to be [fol. 325] invalid. Whether such construction of the law be accurate is not, however, of importance here because no such character of excess is shown. In this connection it

may be remarked that there was no increase in the 1933 assessment over that of 1932; that (while it is by no means conclusive of the accuracy of the 1933 assessment) it is worthy of notice that during the fourteen years preceding this assessment there was only one increase ($1,028,291), which was for the peak expansion year of 1929, while there were four reductions (totalling $12,459,916, of which $4,149,973 was in 1932) and that the average assessment for the four years just preceding 1933, measured by the five factor formula, is 99.07% of true value (1929 being 101.29, 1930 being 96.25, 1931 being 97.33 and 1932 being 101.40). This history rather suggests serious consideration and an endeavor by the Board to treat appellant fairly than arbitrary and unreasonable conduct.

The decree must be affirmed.

CONCURRING OPINION

SANBORN, Circuit Judge, concurring:

The power of the Federal Courts to enjoin the collection of State taxes upon the property of an interstate carrier has been so circumscribed, as pointed out by Judge Stone in his able opinion, that, although I have no doubt that the property of the appellant in North Dakota was overvalued for tax purposes in 1933, I concur in the conclusion reached in the opinion and the reasons assigned for it. I am not, however, in entire sympathy with the rule which seems to preclude any interference with such overassessments unless it clearly appears that they result from purely arbitrary action or from something akin to fraud. While death from an honest error of judgment may be preferable to death designedly caused, the effect upon the victim is the same. Overtaxation resulting from honest mistake or errors of judgment is as serious as that resulting from fraud, and constitutes just as unreasonable a burden upon interstate commerce. I regard state taxation of interstate carriers as a matter of national concern.

In this case the defendants' own expert states that no method of computation with which he is familiar would produce a value for 1933 equal to that fixed by the State Board. To that extent we have a different situation here than in the Rowley case. That the value of the portion

[fol. 326] of appellant's system in North Dakota in 1933, after the appellant had been through three years of depression, even approximated the values of 1928 and 1929 is to my mind inconceivable. Possibly I am substituting my judgment for that of the Board, but the Supreme Court in Atchison, Topeka & Santa Fe Railway Co. et al. v. United States et al., 284 U. S. 248, referred to a record made in a rate hearing in 1928 as pertaining to a "different economic era", and said (page 262):

"This is not the usual case of possible fluctuating conditions, but of a changed economic level." Certainly no group of men in 1933 were ready, able and willing to buy the appellant's system and who were clothed in their right minds, would have paid, as the result of fair negotiations, any such sum for the portion of the road in North Dakota as was fixed by the Board. So that, while I agree that the court below, upon this record, was justified in denying the injunction prayed for, I am suffering from no illusions with respect to the great changes which took place in the value of all railway properties between the years 1929 and 1933. It may be impossible now for the Federal Courts to grant any relief to interstate carriers from overtaxation possibly resulting from honest mistakes or errors of judgment on the part of the taxing authorities of those States through which their lines run, but I believe that if interstate commerce by rail continues to be unreasonably overburdened with state taxes, either Congress or the courts will find some way to protect it. In this connection, the opinions of Judge Webster in Northern Pac. Ry. Co. v. Adams County et al., (D. C. E. D. Wash.), 1 F. Supp. 163, and of Mr. Justice Brandies in Nashville, Chattanooga & St. Louis Ry. v. Walters et al., — U. S. —, opinion filed March 4, 1935, are of interest.

[fol. 327] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 10221

GREAT NORTHERN RAILWAY COMPANY, Appellant,

vs.

J. J. WEEKS, State Tax Commissioner, and Others Named as Appellees in the Citation

April 26, 1935.

DECREE

Appeal from the District Court of the United States for the District of North Dakota

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of North Dakota and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that J. J. Weeks, State Tax Commissioner, and others named as appellees in the citation, have and recover against the Great Northern Railway Company the sum of Twenty Dollars for their costs herein and have execution therefor.

[fols. 328-347] Petition for rehearing, covering 20 pages, filed May 9, 1935, omitted from this print. It was denied, and nothing more, by order of May 24, 1935.

[fol. 348] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—May 24, 1935

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF ISSUANCE OF MANDATE—Filed May 27, 1935

Now comes the appellant, Great Northern Railway Company, and moves the court to enter an order withholding the mandate in this case because it is the bona fide intention of the appellant to make proper application to the Supreme Court of the United States for writ of certiorari in this case, and in support hereof appellant attaches the professional statement of its counsel, F. G. Dorety of St. Paul, Minnesota.

F. G. Dorety, C. J. Murphy, Counsel for Petitioner.

Dated this 27th day of May, 1935.

I hereby certify that it is the bona fide intention of appellant, Great Northern Railway Company, to make ap-
[fol. 349] plication to the Supreme Court of the United States for a writ of certiorari within the time limited by law and that I believe there is merit in its case and that the judgment of the United States Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

F. G. Dorety.

Dated this 27th day of May, 1935.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—May 27, 1935

Upon consideration of the motion of counsel for Great Northern Railway Company, appellant herein, for an order staying the mandate herein pending application to the Supreme Court of the United States for a writ of certiorari,

It is now here ordered that said motion be granted and that the mandate in this case be and the same is hereby stayed until and including the 5th day of July, 1935, provided that if within such stay there is filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record and brief has been filed and proof of notice thereof under the rules of the Supreme Court, such stay shall continue until final disposition by the Supreme Court.

Dated this 27th day of May, 1935.

[fol. 350] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 351] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,732. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 178. Great Northern Railway Company, Petitioner, vs. J. J. Weeks, State Tax Commissioner, et al., etc. Petition for a writ of certiorari and exhibit thereto. Filed June 26, 1935. Term No. 178, O. T. 1935.

FILE COPY

No. 178

Supreme Court, U.S.
FILED
JUN 26 1935
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1934.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

J. J. WEEKS, State Tax Commissioner; J. M. BAILLIE as Auditor and L. T. HALVORSON as Treasurer of Barnes County, et al., all of the State of North Dakota,
Respondents, and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. G. DORETY,
C. J. MURPHY,
Solicitors for Petitioner,
175 E. 4th St.,
St. Paul, Minn.

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Supreme Court of the United States

OCTOBER TERM, 1934.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner and Appellant below,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor, W. D. Conway as Treasurer and Bert M. Salisbury as Auditor-elect of Benson County; Ole Colbornson as Auditor, Sam H. Wilson as Treasurer, C. E. Hurst as Auditor-elect and Arlan Stair as Treasurer-elect of Bottineau County; H. F. Magedanz as Auditor, Jerry Donovan as Treasurer and Thomas P. Borgen as Treasurer-elect of Burke County; F. Ford Doherty as Auditor, C. A. Baumgartner as Treasurer and Paul H. Eddy as Treasurer-elect of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor, H. J. Oberman as Treasurer and Harry Bjornstad as Treasurer-elect of Dickey County; R. H. Lynch as Auditor, O. A. Steffler as Treasurer, Myrtle Skabo as Auditor-elect and Albert T. Heide as Treasurer-elect of Divide County; S. W. Lyman as Auditor, Hugh Peoples as Treasurer and S. K. Haugland as Auditor-elect of Eddy County; J. B. McWethy as Auditor, M. P. Roberts as Treasurer and Alice Cole as Treasurer-elect of Foster County; Martin O. Haugen as Auditor, John Sandbek as Treasurer and Albert Brenna as Treasurer-elect of Grand Forks County; P. A. Melgard as Auditor, R. J. Howden as Treasurer, R. J. Howden as Auditor-elect and H. B. Nelson as Treasurer-elect of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor, Oluf Erickson as Treasurer and

O. M. Fritsvold as Treasurer-elect of McKenzie County; F. J. Haines as Auditor, Nels Hofland as Treasurer, M. L. Glarum as Auditor-elect and Sadie Hofland as Treasurer-elect of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor, J. H. Hannesson as Treasurer and Norval W. Hodgson as Treasurer-elect of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor, W. C. Budke as Treasurer, W. E. Coutts as Auditor-elect and Einar Johnson as Treasurer-elect of Renville County; George J. Fischer as Auditor, Karl L. Mikkelson as Treasurer and Einar Vohnson as Treasurer-elect of Richland County; Jas. H. Penny as Auditor, Allister McKay as Treasurer and E. M. Anderson as Treasurer-elect of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. J. Mustad as Auditor, Florence Carlson as Treasurer and Ella B. Johnson as Treasurer-elect of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortenson as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents, and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action in equity brought in the United States District Court for the District of North Dakota by the Great Northern Railway Company, petitioner herein, against 83 tax collecting officers of the state and of various counties of North Dakota, respondents herein, to contest an assessment of $78,832,888 by the State of North Dakota against the property of the petitioner Great Northern Railway Company for the year 1933 and to restrain the collection of a tax levy of $1,508,352.34. The trial was by the court and decree was rendered against petitioner, plaintiff below, and in favor of the respondents, defendants below. An appeal from said decree was taken by petitioner to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the decree of the district court.

The assessment in North Dakota was almost twice as great, in proportion to the amount of physical plant, as in the seven other states along the Great Northern line, and North Dakota was the only one of the states which did not recognize the depression by substantially reducing its assessment in 1933. (Ex. 9, R. 80-81).

In contrast with the assessment of $78,832,888, plaintiff computed the actual vaue of the property at $23,937,317, or less than one-third of the assessment (Ex. 19, R. 111-113). Mr. Baker, the state's only witness and its ex-Deputy Tax Commissioner, computed the actual value at $63,307,629 according to what the state claimed to be the "best and most accurate

method" (Ex. P, R. 28, 189-190). Mr. Baker testified that after several months' study, he had been unable to make a computation of value equal to the assessment (R. 190). The state offered no explanation as to how the 1933 assessment was in fact determined and suggested no method by which so large an assessment could be computed for that year. The 1933 assessment per mile was identical with that for 1932, and plaintiff contended that the Board had simply adopted a valuation computed for the prior period (R. 26, 81).

Plaintiff contended that the state's valuations included some $20,000,000 worth of terminal property, mountain construction and other properties actually located in other states, which was unlawfully credited to North Dakota by the use of improper mileage prorates; and also that the Tax Board went beyond the permitted range of its discretion in ignoring the shrunken earning power and reduced values of the depression era, and that both the assessment and Mr. Baker's computation of value were based upon obsolete boom period values.

There was no dispute as to basic figures or as to the accuracy of mathematical computations. The pleadings admitted that for 1932 and prior years the Tax Board computed a system value and allocated it to North Dakota in proportion to track miles, ton and passenger miles, car and engine miles and other mileage factors (R. 7, 26). The evidence shows without dispute that the mileage factors used were all of unequal content and represented much less property and service in North Dakota than outside (See brief for references in the record). The mileage factors credited 18.34% of the entire property to North Dakota in 1932 while both sides agree that only 13.85% of the physical plant is located there and that it had less than average traffic density and use value (Exhibits N, J, K, 13, 14).

None of the assessments were absolutely identical in amount with the values computed by the mileage prorates but the assessments for 1930 and 1931 were within a small fraction of 1% of such values. In 1932 and 1933 the computed valuation fell rapidly while the assessments remained relatively stationary, so that for the later years, the computed values were substantially less than the assessments (Exhibit P).

The lower court held that neither the admission in the pleadings that the system value was allocated to the state in proportion to the mileage factors, nor the other evidence of such allocation, were sufficient to prove that the assessments were in fact based upon such allocations, because the assessments were not identical in amount with the mileage computations, and because the state alleged (without any proof) that the Board also considered other evidence and its own common knowledge. The court held that in addition to this proof that substantial effect was in fact given to mileage prorates which necessarily imported $20,000,000 worth of outside values into the state, we must assume the burden of negativing the use of any common knowledge or of any other possibly lawful method of computation which might sustain the assessments.

The most important issues upon the appeal were:

(1) As to the range of discretion permitted to a Tax Board in ignoring changed economic conditions and depression values.

(2) As to whether an admission by the state's expert witness of inability to justify the assessment by any customary method of computation coupled with a computation according to the "best and most accurate method" known to the state, showing the assessment to be more than $15,000,000 in excess of actual value, should not in itself and without other proof of an arbitrary or wrongful method, sufficiently satisfy the court that the assessment must have been arrived at arbitrarily.

(3) As to the necessity of negativing the use of other possibly lawful methods of computation, where the pleadings admit the use of mileage prorates, where the evidence shows that such mileage prorates would necessarily assess about $20,000,000 of values outside the state, and where the assessment approximates although it is not identical with the mileage computation.

(4) As to whether a Tax Board may compute a valuation which includes several million dollars worth of outside property, and then immunize the assessment against attack by adding or subtracting a few dollars based on the "common knowledge" of the Board.

(5) As to whether any unlawfulness proved to exist in the 1932 assessment is not carried over into 1933 by the adoption of the same identical amount for the 1933 assessment.

Judge Sanborn in his concurring opinion said:

> "* * * I have no doubt that the property of the appellant in North Dakota was overvalued for tax purposes in 1933 * * *. In this case the defendants' own expert states that no method of computation with which he is familiar would produce a value for 1933 equal to that fixed by the State Board. * * * I believe that if interstate commerce by rail continues to be unreasonably overburdened with the state taxes, either Congress or the courts will find some way to protect them."

Judge Sanborn nevertheless concurred in the decision, holding that the court was without power to afford relief.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The reasons relied on for allowance of the writ are:

(a) We believe that the Circuit Court of Appeals departed from the principles of *Pennsylvania Railroad Co. v. Jacoby & Co.*, 242 U. S. 89, holding that where it sufficiently appears that an administrative tribunal must have based its result upon a wrongful method of computation, the attacking party is not required to negative the existence before the tribunal of other possibly lawful methods or evidence. Under this decision the admissions and proof that effect was given to an unlawful computation should have been sufficient without requiring plaintiff to negative the use of other evidence or methods; and the identity in amount of the 1933 assessment with that for 1932, coupled with proof that the 1932 assessment was inapplicable to the shrunken values of 1933, and that it was arrived at through the unlawful use of mileage prorates should have condemned the 1933 assessment.

(b) We believe that the Circuit Court of Appeals failed to give adequate weight to *Chicago, Burlington & Quincy R. R. Co. v. Babcock*, 204 U. S. 585, holding that assessing authorities have the immunity from examination of jurors or possibly of judges. To require the taxpayer to negative any consideration by the assessing officers of other methods of computation or of their own common knowledge, while preventing the taxpayer from calling the officers for examination, is to impose a requirement impossible to meet and to deny effective relief.

(c) We believe that the Circuit Court of Appeals violated the principles laid down by this court in *Fargo v. Hart*, 193 U. S. 490; and in *Wallace v. Hines*, 253 U. S. 66, holding that

a state which bases its assessment of railroad property upon the state's proportion of a predetermined system value, cannot lawfully use a basis of apportionment such as mileage, where the mileage is of unequal value, and where the apportionment necessarily assesses property located in other states.

(d) We believe that the decision of the lower court is inconsistent with *A. T. & S. F. Ry. Co. v. United States,* 284 U. S. 248, in which this court took judicial notice of the economic depression amounting to a changed economic level and held that failure of an administrative tribunal to give due recognition to this was not within the permitted range of its discretion. See also *In re Assessment of Kansas City Southern Ry. Co.,* 168 Okla. 495, 33 P. (2d) 772.

(e) The situation here is novel in that the state's only witness confessed that he could not justify the assessment by any known method of computation. The lower court, as stated by Judge Sanborn, felt "circumscribed" by the decisions of this court holding that arbitrary action or fraud must be shown. This court has never applied such a rule in a case where the excessiveness was confessed. We believe that the lower court has misapplied the decisions of this court, in requiring proof of the use of some specific unlawful method in this situation.

(f) As Judge Sanborn points out, "State taxation of interstate carriers is a matter of national concern", and "if interstate commerce by rail continues to be unreasonably overburdened with state taxes, either Congress or the courts will find some way to protect it." We submit that the assessment here is grossly unjust and inequitable and deeply prejudicial to interstate commerce and that the decisions of this court cited above afford ample grounds for relief.

WHEREFORE, your petitioner prays that a writ of certiorari under the seal of this court directed to the Circuit

Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its equity docket No. 10221, Great Northern Railway Company, Appellant, v. J. J. Weeks, State Tax Commissioner; J. M. Baillie as Auditor and L. T. Halvorson as Treasurer of Barnes County, et al., all of the State of North Dakota, Appellees, to the end that this cause may be reviewed and determined by the court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this court, and for such further relief as to this court may seem proper.

Dated June 17, 1935.

GREAT NORTHERN RAILWAY COMPANY,
By F. G. DORETY,
C. J. MURPHY,
Solicitors for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1934.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

J. J. WEEKS, State Tax Commissioner; J. M. BAILLIE as Auditor and L. T. HALVORSON as Treasurer of Barnes County, et al., all of the State of North Dakota,
Respondents, and Appellees below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of North Dakota has not been officially reported but the decree is found at page 53 of the record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit dated April 25, 1935, has not been officially reported to this date but will be found on pages 310-326 in the record.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on April 26, 1935 (R. 327), less than three months prior to the date of application for this writ of certiorari (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph A of Section 240 of the Judicial Code as amended and reenacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Federal jurisdiction exists under Section 41(1) of the Judicial Code covering diversity of citizenship. Plaintiff is a corporation organized under the laws of Minnesota and defendants are all citizens and residents of North Dakota. The amount or value in dispute excluding interest and costs exceeds the sum or value of $3,000.00 as to each of the defendants. Plaintiff alleged that the assessment and levy in question violate the constitution and laws of the United States in that they would take plaintiff's property without due process of law and impose an arbitrary and unreasonable burden on interstate commerce.

Appeal to the Circuit Court of Appeals was taken under Section 225(a) of the Judicial Code.

III.

STATEMENT OF THE CASE.

Admitted Excessiveness of the Assessment.

Paragraph IV of the Complaint (R. 4) sets forth the North Dakota statutes, which are admitted in the Answer, requiring the Board of Equalization to assess our property at its "true and full value in money". The amount of the contested assessment was $78,832,888 (Exhibit P). The amount was identical with the assessment for 1932 except for a deduction of $17,136 representing the value of a small amount of plaintiff's trackage in North Dakota which had been removed. The assessment per mile remained exactly the same as for 1932 (R. 26, 81).

Plaintiff's Exhibit 19 (R. 243) shows a computation of actual value at $23,937,317, or less than one-third of the assessment, based upon three years' average earnings capitalized at 7% and three years' stock and bond prices, allocated between states in proportion to net income (R. 111-113). The same system value allocated by the five factor mileage method advocated by the state would produce a North Dakota value of $37,306,238, or less than half of the assessment (Exhibit 19).

Defendants' Exhibit P in Schedule 4 shows a system value computed by Mr. Baker, the state's expert witness, from five years' earnings capitalized at 6% and five years' stock and bond prices, and allocated on the five factor mileage ratio, giving North Dakota a value of $63,307,629 for 1933, of which the assessment is 124.52%. The state's Answer alleges that this five factor ratio is the "best and most accurate" method of computation (R. 28). And the witness confirms the fact that it is Schedule 4 on Exhibit P which shows what the state claims

to be the fairest basis of allocation (R. 189). Mr. Baker also stated that he had been working on these exhibits for several months and that "in all that time I was not able to find any method of computation that would produce a value to North Dakota equal to the assessment for 1933 by any usually accepted method" (R. 190). This witness offered a large number of computations by various methods and exhausted the alphabet in lettering his exhibits, but nowhere in the record is there a computation equalling the assessment. The only explanation of the assessment for 1933, is its identity with that for 1932.

Factors in the 1932 Assessment Making Its Adoption for 1933 Unlawful.

The fact that the 1933 assessment was in the same amount as that for 1932, coupled with evidence showing how the 1932 assessment was computed, furnishes additional proof that the 1933 assessment was wholly arbitrary.

We have seen that the 1933 assessment was identical with the 1932 assessment except for a reduction of $17,136 representing the value of a small amount of trackage which had been removed. The assessment per mile remained the same as for 1933 (R. 8, 26, 81).

The 1932 assessment was based upon earnings and stock and bond values for the 5 preceding years, viz., 1927 to 1931, inclusive. Both the defendant's witness and the Answer show that a five year period immediately preceding the year of the assessment was always used for this purpose (R. 26, 148-150).

The following table shows the earnings (taken from Exhibit D) upon which the 1932 assessment must have been based.

1927	$29,202,540
1928	31,294,069
1929	32,457,523
1930	21,912,508
1931	12,669,420
5-year average	25,507,212

According to the same exhibit, the 1932 earnings, which were ignored in the assessment, had fallen to $1,290,551 or only 5% of the 5-year average.

It was the 5-year average of $25,507,212 for the years 1927 to 1931 from which the 1932 assessment was computed. And although the earnings for 1931 had fallen to $12,669,420 and for 1932 to $1,290,551, and although the latter figure was not reflected at all in the 1932 assessment, the 1932 assessment was nevertheless adopted for 1933 without any adjustment. It follows that the 1933 assessment was in fact based on average earnings of more than $25,000,000 when the earnings for the two years preceding had fallen to $12,000,000 and $1,000,000 respectively. It is really worse than this. Exhibit P shows that if the assessment had been reduced in 1932 to conform to the already reduced computed value, it should have been $75,605,688, while it was in fact $78,850,024. This was due to the fact that the reduction in assessment had lagged behind the fallen value. In other words, the 1932 assessment, which was adopted for 1933, still reflected a part of the 1931 computation which was based on earnings back to 1926.

The Circuit Court of Appeals held that the identity in amount between the 1933 and 1932 assessments does not prove that the 1933 assessment was arrived at by adopting that for 1932. But at least the figures serve to prove that in order to compute a value for 1933 equal to the 1933 assessment on the

basis of earnings, we would have to ignore the 1932 earnings and go back as far as 1926.

The same thing is true of stock and bond prices. The average stock and bond prices as shown by Exhibit B were as follows:

1927	$590,508,029
1928	606,649,827
1929	609,626,431
1930	571,[illegible]94,190
1931	461,845,051
5-year average	567,984,705

In 1932 the average stock and bond price had fallen to $296,301,177 or less than half of the peak figures (Ex. B).

We submit that the identity in amount of the 1933 assessment with that for 1932, which was based upon the above five-year average, shows that in 1933 the state ignored the 1932 figures entirely and went back as far as 1927 or even 1926 for its stock and bond prices. The figures at least demonstrate that in order to arrive at the 1933 assessment on the basis of stock and bond prices as well as of earnings, the state would have had to ignore 1932 figures and go back as far as 1927 or 1926.

This is even more arbitrary and unreasonable in the case of stock and bond prices than it is in the case of earnings. Current earnings reflect nothing but current conditions, and there is justification for considering past earnings as a measure of possible future earnings. But current stock and bond prices already reflect past prices and earnings as well as the hope for the future. They already reflect the full weight which in the judgment of investors, should be given to the higher prices of the preceding five years. To average them arithmetically

with the past prices is, therefore, to give double weight to the past prices.

Regardless of the unlawfulness of the mileage prorates, it would seem that an assessment which can only be supported by ignoring current earnings and stock and bond prices and those for the entire year preceding the assessment, and going back to prices of six and seven years before in what was virtually a different economic era, is so unreasonable as to be arbitrary per se.

Mr. P. B. Beidelman, the plaintiff's Freight Traffic Manager, pointed out that the plaintiff's gross revenues had fallen from $126,000,000 in 1928 and 1929 to $55,000,000 in 1932 and $62,000,000 in 1933 (R. 65). He made an elaborate analysis of the traffic, commodity by commodity, showing how much of this shrinkage was due to the general business depression and might be recovered under normal business conditions, and how much was due to permanent causes from which there could be no recovery, such as diversion to the Panama Canal, motor vehicles, pipe lines and other agencies of transportation, permanent changes in business conditions such as location of more and more industries on the Pacific Coast, changes in rate-making policies of the Interstate Commerce Commission and other causes. He concluded that there was no reasonable expectation of gross earnings in the future, after return to normal business conditions, of more than $86,000,000 annually (R. 70). Mr. V. P. Turnburke, the plaintiff's General Auditor, made an analysis of the present and probable future level of operating expenses as compared with the past and concluded that with a return of $86,000,000 in gross revenue, the Company's net railway operating income could not be over $14,000,000, as compared with the average five year earnings of $25,000,000 upon which Mr. Baker based his valuation (R. 122).

It might be added that the earnings in these computations were capitalized at 6%. This is admitted in paragraph H of the Answer (R. 27). The state concedes that the proper rate of capitalization "cannot well be less than investors are willing to accept in making an investment in the same class of risk under ordinary conditions" (R. 148).

During the year 1933 when the assessment was made and also during the year 1932 preceding the assessment, the average actual yield on the market price of all outstanding Great Northern bonds varied from 10.72% to 11.23% (Exhibit 17, R. 109, 242). This shows the rate of yield which was required, not for purchase of the entire property including the equity, but for investment in bonds of the company affording a lien prior to the stock. Ordinarily the rate for capitalization of entire earnings in a railway tax case should be above the average bond yield. *M. & O. R. R. Co. v. Schnipper,* 31 F. (2d) 587, 589. Nor is this a temporary rate for a day, a week or a month, but it was the average yield required by investors in bonds over a period of two years. The rate of 6% may have been a fair rate to apply in making the assessment for 1931, and possibly for 1932. But there is no evidence in the record that capital could have been obtained at any such rate in the year 1932 or 1933 for this class of enterprise. For this additional reason, it would seem to be wholly unreasonable and arbitrary to adopt the 1932 assessment for 1933 or to adopt an assessment for 1933 that could only have been computed by capitalizing boom period earnings at a rate 4% below what investors were actually demanding.

Proof that Mileage Prorates Were Actually Used in Making the Assessment.

The pleadings on which we rely in proving the actual use of mileage prorates in allocating system value to North Dakota are as follows:

Paragraph IX of the Complaint reads as follows: (the italics being supplied)

"The assessments of plaintiff's property in North Dakota for 1933 and for many years immediately preceding were the result in effect of assessing in North Dakota properties and values actually located in other states, and of over valuing plaintiff's railroad system. For the year 1932 and many preceding years, the assessing authorities of North Dakota determined a value for plaintiff's railroad system by capitalizing its average yearly net earnings or income for various past periods at various rates of percentage and by averaging the value thus obtained with the average value of plaintiff's stocks and bonds as determined by their average selling price for various preceding periods, certain amounts being deducted from said stock and bond value as representing the value of property and securities owned by plaintiff but not constituting a part of its railway system. *Said assessing authorities then allocated to North Dakota as the value of plaintiff's property in North Dakota* a portion of said system value equal to the average proportion which certain figures for North Dakota bore to the corresponding figures for plaintiff's entire railroad system. The figures used in determining said proportions were the following:

(1) Miles of all track.

(2) Amount of physical property as measured by cost of reproduction less depreciation.

(3) Cars and locomotives moved one mile.

(4) Tons of freight and passengers moved one mile.

(5) Gross earnings, the gross earnings in North Dakota being computed by adding to the revenues in North Dakota from intrastate traffic a proportion of the revenue from all interstate traffic passing into or through North Dakota equal to the proportion which the miles of track in North Dakota used for moving such traffic bore to the total miles of track used for moving such traffic."

Paragraph F of the Answer (R. 26) answering Paragraph IX denies the assessment of property in other states and denies overvaluing plaintiff's property but makes no denial of the use of the five factor allocation ratio.

The following table shows a comparison between the values computed by the five factor ratio, by Mr. Baker, the state's expert witness and ex-Depnty Tax Commissioner, and the actual assessments as shown in Exhibit P Schedule 4.

	Computed Value	Assessment	Per Cent of Assessment to Computed Value
1930	$83,448,252	$83,294,688	99.82
1931	82,659,839	82,999,997	100.41
1932	75,605,688	78,850,024	104.29
1933	63,307,629	78,832,888	124.52

It will be noted that the 1930 assessment was within 18/100 of 1% of the value computed by the mileage prorates, and that the 1931 assessment was within 59/100 of 1%. It will also be noted that the ratio of the assessment to the computed value for 1932 and 1933 is larger simply because the computed valuation decreased while the assessment remained relatively stationary.

That effect must have been given to the mileage prorates is also shown by the fact that the assessment could not have been reached in any other way. The highest system value computed by the state's expert and shown on Exhibit P for 1933 is the five year stock and bond value of $358,297,406. This is

the highest system value computed by any witness by any method. The highest composite system value shown for any year is the 1930 value of $460,989,128. The 1933 assessment for North Dakota is nearly 23% of the highest 1933 system value and more than 17% of even the 1930 system value.

It is shown both by the state's Exhibit N and by plaintiff's Exhibit 19, line 4(e) that as of December 31, 1932, not over 13.85% (as measured by cost of reproduction less depreciation) of the physical plant was located in North Dakota. It is shown both by the state's exhibits J and K and by plaintiff's exhibits 13 and 14 that the traffic density in North Dakota was less than the average for the system, so that North Dakota's proportion of the system use value was no greater than its proportion of the system physical property. There is, therefore, no possible method of allocation by which the North Dakota value can be found to exceed 13.85% of the system value, and no possible method by which the assessment could have been reached, except by the use of mileage prorates.

Mr. Baker, ex-Deputy Tax Commissioner of North Dakota, stated with reference to the five allocation factors in question, "* * * Those five, in substance, are approximately what we have used in North Dakota to a greater or less extent for a number of years; the only difference I believe is that we have used car and locomotive mileage and not car mileage" (R. 151). On page 188 he says, "These formulas which I have presented (in Exhibit P) together with the various combinations of factors were at various times presented to the Board of Equalization by the Tax Commissioner, and the railroads did the same sort of thing". On page 170, he says, "All of the factors that I have used in this exhibit are factors in common use by taxing authorities and railroads in connection with assigning values for tax purposes, except the factor which I have

termed trackage owned and operated and trackage leased and operated". On page 171, he says, "I believe that tax officials and railroad tax men always make composite allocations based upon an average of the result of several of these factors".

The pleadings and evidence, therefore, establish the fact that allocations of system value were in fact made by the five factor ratio, that no methods of allocation except mileage prorates were in use, that the assessments were almost identical with the result of the mileage computations, except as they lagged behind when computed values were falling, and that there is no other known method by which so large a North Dakota value could be obtained from the highest claimed system value.

Proof that Mileage Prorates Actually Assessed Property in Other States.

The map (Exhibit 2) shows North Dakota as a gridiron of branch lines. Exhibit 6 shows that 61.7% of the mileage in North Dakota is branch line mileage, while the percentage on the balance of the system is only 43.5%. Exhibits 4 and 7 show that the three largest terminals are outside the state and are almost equal in value to the entire property in North Dakota (R. 75-77). Exhibit 5 shows that, of the smaller terminals, there are fewer per mile in North Dakota and that those in North Dakota are slightly smaller than the average (R. 76).

Exhibit 3 shows that the average mile of track in North Dakota has only 80.5% as much rail, 59.5% as much grading, about half as much bridging, and 63.9% as much signal installation as the balance of the system and practically no snow-sheds or tunnels (R. 74-75). Exhibit 7 shows that the average mile on the balance of the system contains 198% as much

total physical property as the average mile in North Dakota (R. 77).

In considering miles of movement such as car miles, ton miles, etc., we must remember that railroad service includes three elements: (1) providing the plant and equipment (2) keeping it in repair and (3) moving the traffic. The factor showing miles of movement reflects only the third element out of the total service. It follows from the statements in the last paragraph that for every mile of movement outside the state, the company has to provide twice as much plant and also to repair twice as much plant. In this respect an average mile of movement outside the state includes more total service than an inside mile.

An average car mile in switching service in the large terminals which are located in other states requires about 15 times as much effort and costs about 15 times as much in operating expenses as the average car mile on the road (R. 114-117). In using a car mile ratio, ten or fifteen cents worth of transportation service in North Dakota is assumed to be an equivalent unit with $3.00 worth of transportation service in the Minnesota and Washington terminals, simply because both are spread over a mile of ground (R. 114).

An average carloading in North Dakota is around 16 tons while the average carloading on the balance of the system is nearly 30 tons (R. 116, 130, 135). This is due to the large amount of less than carload tonnage moving in lightly loaded cars on North Dakota branch lines (R. 135).

While a locomotive on the iron ore carrying lines of the Great Northern in Minnesota hauls 170 cars or twelve or thirteen thousand tons per locomotive mile, a locomotive on the branch lines in North Dakota would haul about two to four hundred tons on the average. These particular engine

miles in North Dakota have an actual value in volume of traffic handled equal to only 1/70 of those on the Minnesota ore lines (R. 116). The state's tax expert conceded that car and engine miles moving smaller tonnage should not be given as much credit as car and engine miles with heavier tonnage (R. 201).

Exhibit 12 Schedule B, Line 7 (R. 239) shows that the movement of a thousand tons of freight one mile in North Dakota requires $7.19 worth of effort while the average movement of a thousand tons on the balance of the system requires $9.89 worth of effort. The ratio is nearly 10 to 7. As the average carload in North Dakota is 16 tons and the average carload on the rest of the system is 30 tons, it is easy to compute that the movement of an average car one mile in North Dakota requires 11½¢ worth of effort while the movement of an average car one mile on the balance of the system requires 29.68¢ worth of effort.

Still another vice of all of the ratios reflecting miles of movement is that they ignore mileage made in switching service in the terminals and consider only the miles made in roadhaul between terminals (R. 78, 115). If there should be five or six miles of switching service after the car reaches a terminal, each of these miles costing as much as 15 roadhaul miles, the effect would be the same as if we excluded 75 to 90 miles of roadhaul service outside the state on each trip while including the entire mileage made in North Dakota.

One of the factors used by the state in the five factor ratio is a gross revenue factor. But in computing gross revenues earned in North Dakota, interstate revenues are allocated in proportion to miles of road only (R. 87). 92% of all the traffic in North Dakota is interstate (R. 70). Approximately one-third of the service in an average through haul (as measured by cost) is performed in the terminal and two-thirds on

the road (R. 117). The miles made in terminals are given no weight whatever in computing the ratio, although they should be entitled to about fifteen times as much weight as road miles (R. 79, 115). It follows that a prorate of interstate revenue in proportion to miles of road is virtually a repetition of the track mile ratio and accords an excess of credit to a state like North Dakota.

Practically no rates are based on an absolute mileage basis (R. 125). There are no rules in the freight tariffs or accounting practices providing for mileage prorate of revenues as between states, and there is no public authority for allocating revenues on a mileage basis (R. 95).

The physical property ratio is the only ratio in the five factor formula which does not reflect mileage. There would be no serious objection to this factor if used alone, but when combined with four other factors all reflecting mileage, the result is greatly distorted. And the composite gives four times as much weight to mileage as to physical property (R. 66). The average of the five factors is 18.34% for 1933, while the physical property ratio alone at the end of 1932 was 13.84% (Exhibit N).

It follows that in measuring both property and service in North Dakota and on the balance of the system, the state used units of measurement which were alike only in length, and that the miles used for measurement in North Dakota were very much smaller in volume and the result was like comparing two bins of potatoes by measuring one with a half bushel basket and the other with a full bushel basket.

The record shows some illustrations of what absurd results can be produced by this sort of a comparison. For example, the Great Northern iron ore line lies 90 miles in Minnesota and 10 miles in Wisconsin, but the 10 miles in Wisconsin in-

clude the docks, repair shops and terminals and contain as much physical plant measured by cost as the 90 miles in Minnesota. The property in each state cost about $16,000,000, making a total of $32,000,000. And yet 90% of all track miles, car and engine miles, ton miles and gross revenue (on a mileage prorate) are credited to Minnesota, so that on the North Dakota formula, the aggregate value of $32,000,000 would be divided in such a way as to produce a $29,000,000 assessment for the $16,000,000 worth of property in Minnesota and a $3,000,000 assessment for the $16,000,000 worth of property in Wisconsin. The fallacy, of course, lies in overlooking the fact that in this particular case, the average mile of track and the average mile of movement in Wisconsin contain about nine times as much volume as the average mile in Minnesota (R. 96, 114, 139, 140).

If a road had a ten mile tunnel in one state and ninety miles of line in an adjoining state, each costing the same amount, the five factor formula would credit the latter state with 90% of the combined value and the former state with only 10%, although the property in each had the same cost. On the other hand, if the road in the first state were built 90 miles around the mountain instead of 10 miles through it and at the same cost, this state would get 50% of the combined value instead of only 10%, although its property would have no greater cost and perform no more service. The state's tax expert concedes that in such cases the five factor formula would not produce correct results (R. 197-8). There are actual situations on the Great Northern Railway where the North Dakota formula produces this same kind of a distortion except in a lesser degree (R. 77, 117-118).

Not only does the average mile of track in North Dakota contain only half as much plant, but, the plant carries less

traffic density than the average for the system. It is shown both by the state's exhibits J and K and by plaintiff's exhibits 13 and 14 that the traffic density in North Dakota is less than the average of the system. It follows that with only 13.84% of the physical property being located in North Dakota and with that property having a lower than average traffic and use value, the state, by the use of the five factor ratio, has assessed 18.34% of the entire property. She has assessed the 13.85% within her own borders and an additional 4.5% located in other states.

It is possible to allocate interstate revenues between the states in proportion to the cost of plant and cost of service contributed by each state toward the earning of the revenue. The plaintiff made such an allocation on Schedule B of Exhibit 12. It then added to North Dakota's share of the interstate revenue, her entire revenue from intrastate traffic and deducted the total expenses incurred in North Dakota, thus determining the amount of net income earned within the state. Exhibit 12 shows that over a five year period, 12.22% of the system net income was earned in North Dakota. If the system value be prorated in proportion to net earnings or earning capacity, only 12.22% should be allocated to North Dakota (R. 87-96). This confirms the fact that since only 13.85% of the physical plant is located in the state, and that portion has slightly less traffic value than the average, the allocation of system value to North Dakota should be something less than 13.84%. It again follows that in assessing 18.34% of the system value, North Dakota has assessed many millions of dollars worth of property outside the state. On the 1932 system value of $415,278,961 computed in Exhibit P, nearly $20,000,000 worth of property outside the state was allocated to North Dakota by the five factor ratio.

Of course, the actual assessment in many cases was higher than even the five factor formula would produce, due to the fact that assessments were not reduced as computed values fell. Exhibit 21 shows that the actual assessment in North Dakota during the years 1928 to 1932, inclusive, was from 46.4% to 94% in excess of the proportion of system value which could properly have been allocated to North Dakota on the basis of earning capacity.

IV.

SPECIFICATIONS OF ERROR.

(1) The Circuit Court of Appeals erred in failing to find that the assessment was more than double the actual value of the property and in failing to set aside the assessment on that ground.

(2) The Circuit Court of Appeals erred in permitting a range of discretion to the Tax Board sufficient to allow it to substantially ignore depression values and reduced economic levels and to base its assessment upon boom period values.

(3) The Circuit Court of Appeals erred in holding that plaintiff, in addition to proving the use of mileage prorates, must negative the use of any other possibly lawful method.

(4) The Circuit Court of Appeals erred in failing to find that the use of a wrongful method or arbitrary action was sufficiently established by the plaintiff's evidence of excessiveness plus the unsuccessful attempt of the state to justify the assessment; by the confession of the state's only witness that the assessment was 25% in excess of value computed by the "best and most accurate method", and that he knew of no method by which it could be justified.

(5) The Circuit Court of Appeals erred in holding that there is no basis for finding that property without the state has been assessed, unless the Board of Equalization adopted the "exact result" of a computation which included such outside values.

(6) The Circuit Court of Appeals erred in holding that there was no evidence of any deliberately arbitrary or wrongful assessment concerning years prior to 1933.

(7) The Circuit Court of Appeals erred in holding that any unlawfulness in the 1932 assessment was not necessarily carried over when the same assessment was adopted for 1933.

(8) The Circuit Court of Appeals erred in holding that it was not sufficiently established by the pleadings and evidence, that mileage prorates were in fact used in making the assessment, and that the Board of Equalization was guided or largely influenced by such computations.

(9) The Circuit Court of Appeals erred in holding that the proof of unlawfulness in the mileage prorate method of assessment depended upon proof that the only approximately true method of allocation was one based on "expense of operation".

(10) The Circuit Court of Appeals erred in holding that there is any evidence in this case that a 4% rate for capitalizing earnings would have been justified in 1933 and in failing to hold that 7% was not the minimum rate permissible under the evidence.

(11) The Circuit Court of Appeals erred in failing to find that the State of North Dakota by the use of mileage prorates had assessed many millions of dollars worth of property located in other states.

(12) The Circuit Court of Appeals erred in affirming the decision of the District Court and in entering judgment against the petitioner and in favor of the respondents.

(13) The Circuit Court of Appeals erred in not entering judgment in favor of the plaintiff as prayed for in the complaint.

V.

ARGUMENT.

The Usual Rule, Requiring Proof of Some Specific Arbitrary Method, Should Be Held Inapplicable to the Facts in this Case.

Where a taxpayer merely offers evidence of a value lower than the assessment, with no evidence of arbitrary action or fraud, the state is entitled to rest upon the presumption of lawfulness and is not obliged to support the assessment by evidence of its own. But where the showing of the taxpayer is so strong that the state feels compelled to defend the assessment, or where for any reason it attempts such a defense, and fails to produce any evidence whatever sufficient to support its assessment, but produces many computations of value all falling short, we submit that the conclusion is not only fair but inescapable, that the state had no proper basis for the assessment and that it must have been arrived at arbitrarily. As pointed out by the Circuit Court of Appeals, failure to testify cannot be used against the state, but where the state waives its privilege and chooses to justify the assessment and confesses that it is unable to do so, especially after such an elaborate attempt by an ex-Commissioner as was made here, it

is tantamount to confessing that the assessment was not based on any evidence or process of reasoning but that it was a purely arbitrary determination.

We have not been able to find any decision where there was such an implied confession as this and where the taxpayer was nevertheless required to specify the method used and to prove that it was arbitrary. Indeed, if it be a fact that the assessment was purely arbitrary—if no method whatever was used—it would be quite impossible for the taxpayer to specify any method or to prove that it was unlawful. Here the state's expert witness confessed that after months of study, he had been unable to find any method of computing value equal to the assessment. Evidence offered on both side proves that the value was far below the assessment. There is strong evidence that the actual value was only 1/2 or 1/3, and it requires no Sherlock Holmes to deduce from the evidence that the Board made no assessment upon 1933 data, but simply adopted an assessment made for a previous year which necessarily omitted any consideration of the shrunken earnings and stock and bond prices, and which was based largely upon data from an obsolete boom period.

As indicating the reluctance with which the Circuit Court of Appeals required proof of an arbitrary method, in addition to proof of the excessiveness, we quote the short concurring opinion of Judge Sanborn which was as follows:

> "The power of the Federal Courts to enjoin the collection of State taxes upon the property of an interstate carrier has been so circumscribed, as pointed out by Judge Stone in his able opinion, that, although I have no doubt that the property of the appellant in North Dakota was over-valued for tax purposes in 1933, I concur in the conclusion reached in the opinion and the reasons assigned for it. I am not, however, in entire sympathy with the

rule which seems to preclude any interference with such overassessments unless it clearly appears that they result from purely arbitrary action or from something akin to fraud. While death from an honest error of judgment may be preferable to death designedly caused, the effect upon the victim is the same. Overtaxation resulting from honest mistake or errors of judgment is as serious as that resulting from fraud, and constitutes just as unreasonable a burden upon interstate commerce. I regard state taxation of interstate carriers as a matter of national concern.

In this case the defendants' own expert states that no method of computation with which he is familiar would produce a value for 1933 equal to that fixed by the State Board. To that extent we have a different situation here than in the Rowley case. That the value of the portion of appellant's system in North Dakota in 1933, after the appellant had been through three years of depression, even approximated the values of 1928 and 1929 is to my mind inconceivable. Possibly I am substituting my judgment for that of the Board, but the Supreme Court in Atchison, Topeka & Santa Fe Railway Co., et al. v. United States, et al., 284 U. S. 248, referred to a record made in a rate hearing in 1928 as pertaining to a 'different economic era', and said (page 262):

> 'This is not the usual case of possible fluctuating conditions, but of a changed economic level.'

Certainly no group of men who in 1933 were ready, able and willing to buy the appellant's system and who were clothed in their right minds, would have paid, as the result of fair negotiations, any such sum for the portion of the road in North Dakota as was fixed by the Board. So that, while I agree that the court below, upon this record, was justified in denying the injunction prayed for, I am suffering from no illusions with respect to the great changes which took place in the value of all railway properties between the years 1929 and 1933. It may be im-

possible now for the Federal Courts to grant any relief to interstate carriers from overtaxation possibly resulting from honest mistakes or errors of judgment on the part of the taxing authorities of those States through which their lines run, but I believe that if interstate commerce by rail continues to be unreasonably overburdened with state taxes, either Congress or the courts will find some way to protect it. In this connection, the opinions of Judge Webster in Northern Pacific Ry. Co. v. Adams' County, et al., (D. C. E. D. Wash.), 1 F. Supp. 163, and of Mr. Justice Brandeis in Nashville, Chattanooga & St. Louis Ry v. Walters, et al., ... U. S. ...., 55 S. Ct. 486", opinion filed March 4, 1935, are of interest.

We believe that a sounder line of reasoning is found in the language of Judge Webster in *Northern Pacific Ry. Co. v. Adams County,* in 1 Fed. Supp. 163, at pages 170 and 171, where the court said:

"There is no direct evidence in the record showing the methods which were employed by the tax commission in making the offending assessments. No member of the commission took the stand to explain the basis or bases upon which the commission acted in valuing and assessing the properties. No record of the commission shedding light on the method used was produced in evidence. It requires no argument to demonstrate that this attitude on the part of the commission does not foreclose all inquiry into the legality of their determinations. It merely serves to make necessary a different and obviously more difficult method of approach. In order to determine whether their valuations were properly made or are tinctured with constructive fraud arising out of gross excessiveness, it becomes necessary to consider whether, under any legally permissible method or combination of methods recognized by law for ascertaining value, their action can be upheld as within the proper and legitimate exercise of their powers and discretion. This will be the standard of measure-

ment which I shall apply in reaching my conclusions in this regard.

* * * * * *

Inasmuch as the Legislature of Washington has not defined specifically how railroad property shall be valued for taxation, I am of the opinion that the proper way of testing whether the action of the state tax commission can be upheld is to inquire whether under any legally authorized method or methods its determinations can be justified and sustained."

In the case just quoted from, the amount of overassessment which was alleged (p. 168) was much less than the excess which we believe we have proven in this case, and yet the court found there that the assessments were "so grossly excessive as to give rise to a presumption of constructive fraud" (p. 185).

There Was Arbitrary Action in Disregarding Depression Economics.

Our 1929 assessment at the culmination of the boom period was $83,294,677. It was reduced about $4,000,000 in 1932 and the 1933 assessment was only 5% below that for 1929 (Exhibit P). Assessments for previous years are shown on Exhibit Q. The customary bases for determining system value, such as earnings and stock and bond prices, whether for periods of one year, three years, or five years preceding the assessment, had decreased from 21.89% to 89.81%, between the assessment dates of 1932 and 1933. The average decrease was 50.52% (Ex. 20, R. 119).

That a failure to give adequate recognition to changed economic conditions is not within the permissible discretion of an administrative tribunal, is the effect of the decision in *A. T.*

& S. F. Ry. Co. v. United States, 284 U. S. 248. At page 260 this court said:

> "There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation'. The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression', and stated that 'the chief cause of these reductions has been loss of traffic'. For 'in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions'."

Referring to suggestions regarding the wide discretion of the Commission, the court said on pages 261 and 262:

> "These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions."

The following language on page 262 seems equally applicable to a tax board:

> "We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements."

Following this the court held that failure to recognize changed economic conditions "was not within the permitted range of the Commission's discretion."

It would seem to follow that an assessment for 1933 which can only be justified by ignoring earnings and stock and bond prices of 1932 and 1933 and going back to the boom years of 1926 to 1929 is not within the permitted discretion of a Tax Board.

In the case of *In re Assessment of Kansas City Southern Ry. Co.*, 168 Okla. 495, 33 P. (2d) 772, the court held that an assessment for 1933 based upon earnings and stock and bond prices for the five years immediately preceding the assessment were so arbitrary that it must be cancelled, upon the ground that the five year period included boom year earnings of an obsolete economic era which no longer afforded a logical measure of probable future earnings. The court said (p. 786 Pac. Rep.):

> "The court takes judicial knowledge that there has been an era of depression, nation and world wide. This has had its destructive influences on railroad property as well as other property.
>
> * * * * *
>
> "We do not think it tenable that those two years, 1928 and 1929, should be used in reflecting an assessed valuation of the railway property in 1933.
>
> * * * * *
>
> We have been passing through an entirely different economic and industrial era since the years 1928 and 1929. Panicky conditions have prevailed. The organic condition of the railroad, its ties, rails, equipment, etc., are perhaps substantially the same, usual wear and tear excepted, but the figures conclusively prove that there has been a loss of earning power occasioned by other competing transport agencies, bus lines, truck lines, and air

lines. The railway company asserts with confidence that this loss of business will not return to the railway company.

In the light of these facts, we are of the opinion that the taxable value of the railway company as of February 1, 1933, cannot be determined by measuring the peak of prosperity in the years 1928 and 1929 with the income derived during the commercial disaster of the business, in the years 1930, 1931 and 1932, and that the years 1930, 1931 and 1932 constitute a measurably substantial period of time for the purpose of sufficiently reflecting the proper assessable value of the property in question fixed as of February 1, 1933."

Our case is stronger than the Kansas City Southern case because there the Board had actually attempted to exercise its functions in 1933 and had based its computation upon the five preceding years including 1932 while here the assessment can only be computed by eliminating 1932 entirely and going back as far as six years before the assessment.

Mr. Baker computed his valuation of $63,307,629 for the North Dakota property (which was 25% below the assessment) from earnings and stock and bond prices of the five years 1928 to 1932, inclusive, including the boom years of 1928 and 1929, capitalizing the earnings at 6% and allocating the system value to North Dakota by mileage ratios (Exhibit P). The valuation of $23,937,317 (Exhibit 19) is obtained from earnings and stock and bond prices of the three years 1930 to 1932, capitalizing the earnings at 7% and allocating the system value in proportion to earning capacity.

We submit that whatever value there may be in stock and bond prices lies in the current figures. If the average value of Great Northern stock for the past three years has been 15, the fact that it sold at 125 five years ago throws little light on the

judgment of investors as to the present value of the property. Past prices are already given all the weight that they are entitled to on the present market. If in Exhibit 19 we had capitalized earnings for five years instead of three years, and retained the three years' stock and bond prices, the North Dakota valuation would have been increased to about $31,000,000.

If the system value of $345,188,820 computed by Mr. Baker in Exhibit P from the five year figures were allocated in proportion to earning capacity, his North Dakota value would be only about half of the assessment. In order to reach Mr. Baker's computation of $63,307,629 (which is 25% below the assessment), we must assume first that stock and bond prices as well as earnings of a period five years before the assessment are entitled to the same weight as current prices and earnings in determining system value, and second that North Dakota can assess 18.34% of that system value although only 13.85% of the property is within her borders. If any substantial weight be given to current stock and bond prices and to the fact that the current yield on investment in Great Northern bonds was more than 10%, or if any correction be made for the excess in mileage prorates, either correction would enforce the conclusion that the assessment was at least double the actual value of the property.

Based upon the maximum gross earnings of $86,000,000 a year to be expected in the future as estimated by Mr. Beidelman, and the net earnings from this revenue of $14,000,000 as estimated by Mr. Turnburke, the system value, even with a 6% rate of capitalization, would be less than $235,000,000, and North Dakota's share, even on the mileage prorate, would be less than $45,000,000.

The Actual Use by the State of the Mileage Prorates as a Method of Allocation was Sufficiently Proven.

Assuming that in spite of the confessed excess in the amount of the assessment, and the failure to recognize depression values, we are still required to prove a specific method by which the assessment was arrived at, and that it was unlawful, we submit that we have met this requirement.

Mr. Baker testified that the mileage ratios had been used for a number of years. All of the computations of value in his numerous exhibits are based on mileage prorates. He was Deputy Tax Commissioner for 13 years (R. 144). His entire testimony is in advocacy of mileage prorates. In an elaborate description of all methods of taxation known to him, he mentioned no other method of allocation. The allegation of the Complaint is not denied that for many years the assessing authorities allocated system value to North Dakota on the five factor ratio. And in 1930 and 1931 the assessments were within a fraction of 1% of the amounts so computed. The Board had these computations before them; they had no other computations based on any other method of allocation; the assessment closely approximated the computation; and there is no other possible method by which so large an assessment for North Dakota could be determined from even the highest estimate of system value shown in the record. North Dakota contains only 13.85% of the total plant, and that 13.85% had less than average use value. 13.85% of $345,188,820, which is the highest system value computed by anyone for 1933 (Exhibit P), would produce an assessment of only $48,000,000 as compared with the actual assessment of nearly $79,000,000.

No slight variation between the assessment and the unlawful computation can cure this. To include in the computation

$20,000,000 worth of outside property and then to subtract or add half a million does not right the wrong. It is the giving of substantial effect to the unlawful formula and not the rigid adherence to every detail of it that forms the basis of our action.

If the assessment in 1931 had been $82,659,839 (the exact amount of the mileage computation) instead of $82,999,997 as it was (a difference of $340,158.00) we take it that the Circuit Court of Appeals would have been compelled to admit that the assessment was arrived at by the use of mileage prorates and that it contained approximately $20,000,000 worth of values outside the state. Because $340,000 was deducted, the court seems to have assumed that the $20,000,000 error was cured and that the court was without power to afford relief. It seems contrary to sound judgment for a court to so emasculate its powers by deliberately tieing its own hands with technicalities which seem so unrelated to reason and logic.

And if the out-state values were in the 1931 and 1932 assessments, they still remained there when the 1932 assessment was adopted for 1933, even though the computation was not repeated for that year. The controlling question must be whether the assessment includes substantial out-state values.

We Should Not Be Required to Negative the Use of Other Methods.

The Circuit Court of Appeals held that in addition to this proof that substantial effect was in fact given to the mileage prorates, we must go further and negative any use of any possibly lawful method of computation which might sustain the assessment.

We submit that this violates the spirit and principle of the decision of this court in *Pennsylvania Railroad Co. v. Jacoby*

& Co., 242 U. S. 89. In that case the railroad company was attacking a reparation award of the Interstate Commerce Commission which, like the assessment in question here, was presumed to be lawful. The proof consisted simply in showing that the amount of the award was identical with the amount of a computation contained in a certain Exhibit 10, which had been introduced before the Commission by one of the parties, and which the court held would be an unlawful method of computation.

In that case the railroad company had not produced in court the entire record made before the Commission. It appeared that the Commission had had before it, evidence other than that which was produced in court, and the railway company failed to negative the possibility that some of the other evidence might have been sufficient to justify the award by some lawful method of computation. For this reason, the plaintiff took the position, which the Circuit Court of Appeals took in our case, and urged that under the presumption of lawfulness, the railway company's attack upon the award was inadequately supported. This court said on page 99:

> "It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the

> same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

We might paraphrase the second sentence of the above quotation by saying:

> "But it is difficult to reach the conclusion that the Board of Equalization could have arrived at a result so closely corresponding with the one obtained by the use of the mileage prorates, except by actually using the mileage prorates to ascertain the assessment which so closely approximates the amount resulting from their application."

In many ways our case is stronger than the Pennsylvania Railroad case. There the unlawful computation had been introduced by a litigant and not at the request of the Commission. Except for the identity in amount, there was no evidence that the Commission had placed any reliance upon it. Here the unlawful computation was one procured by the Board itself, not only for the current year but for several preceding years, and there is no suggestion of any other method of computation which was ever considered. While the amounts are not identical, this is explained by the obvious fact that the assessment for each year was related to that for the preceding year. The assessment was clearly the result of the mileage computation, with some modification to avoid too great variation from preceding assessments. In addition we have positive proof here that no system value could have been com-

puted, high enough to support the North Dakota assessments except by a mileage allocation.

We submit that there is even greater reason in a case against a tax board than in a case against the Interstate Commerce Commission for a court of equity to relax the rigorous requirement that the existence of other wrongful evidence must be negatived, and for shifting the burden of proof to the administrative board under such a showing as this. The Board of Equalization of North Dakota is not required to hold hearings nor to make a record of evidence considered by it. And in *C. B. & Q. R. R. Co. v. Babcock*, 204 U. S. 585 at 593, this court held that the members of such a board have the immunity of a juror if not of a judge in the matter of being examined in regard to the findings. It follows from this as a practical matter that if the opinion of the lower court is to stand, the Tax Board is free to compute its assessment by an unlawful formula, add or subtract a few dollars so as to destroy the "identity" and rely upon an allegation and a presumption that other evidence and common knowledge were considered, to cure the illegality. The burden of negativing this as a practical matter is an impossible one. The effect is to leave the taxpayer subject to extortion and confiscation and to deny him any relief in equity.

It is so easy for the Board to show what evidence and what knowledge it had and so difficult if not impossible for the taxpayer to show it that there would seem to be even more justification in a tax case than in a case against the Interstate Commerce Commission for a court of equity to relieve a taxpayer of this crushing burden of proof when the evidence fairly convinces the court that a wrongful method has been used and that wrong has been done.

As to our contention that the 1933 assessment was determined merely by adopting the 1932 assessment with a slight correction for trackage removed, *Pennsylvania Railroad Co. v. Jacoby & Co.*, supra, seems to support this contention exactly, because here we have the exact identity in amount which was shown in that case.

Unlawfulness of the Mileage Prorates.

Assuming it to be sufficiently shown that the assessment reflected the use of mileage prorates, and based upon the undisputed proof that the mileage factors used were all of substantially smaller volume in North Dakota, the unlawfulness is established by many decisions of this court.

In *Fargo v. Hart*, 193 U. S. 490, this court said:

> "It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

The last two sentences are peculiarly applicable to the facts in our case because it is shown here that three of our outside terminals were in fact substantially equal in value to the entire property in North Dakota.

In *Wallace v. Hines*, 253 U. S. 66 at 69, the court said:

> "As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

In the recent case of *Rowley v. C. & N. W Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55, the court said:

> "Where, as in this case, the evidence requires a finding that the railroad in one of the states reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that state, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary."

See also *Pittsburgh, C. C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421; *Union Tank Line Co. v. Wright*, 249 U. S. 275; *Southern Ry. Co. v. Kentucky*, 274 U. S. 76.

These decisions did not hold that a mileage prorate was unlawful per se and in all cases. It might be proper where values are equal. It was held unlawful in these cases only because of the result—because the court was convinced as a fact

that in the particular case, property outside the state was being taxed.

Wallace v. Hines, supra, involved the petitioner in this case, and it involved the State of North Dakota. It arose upon demurrer to the complaint which the Court summarized as follows: "North Dakota is a state of plains, very different from the other states and the cost of the roads there was much less than it was in mountainous regions that the road had to traverse. The state is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

All of the facts referred to by the court in that case and a great many stronger facts have been proven here without contradiction so far as the inequality of track miles goes. That decision would be exactly in point here if it were not for the fact that North Dakota has now adopted a composite factor of allocation, averaging the track mileage ratio with other ratios showing miles of service.

It is true that this court sustained a somewhat similar composite factor in *Rowley v. C. & N. W. Ry. Co.,* 293 U. S. 102, 55 S. Ct. 55, but there there was no evidence that the traffic and service miles were of unequal value inside and outside the state. For all that appears in that case, a car mile, engine mile or ton mile inside Wyoming on the C. & N. W. Ry. Co. may have represented as much or more service as an average corresponding mile of service outside the state.

The facts in our case show an exceptional situation as to the service and traffic miles on the Great Northern Railway in North Dakota as well as the track miles.

To measure the property inside and outside North Dakota by using a mile of track as a measuring unit is to use a half sized measuring unit inside the state. It is mathematically demonstrable that it assesses property outside the state.

It is just as demonstrable that the state of North Dakota reaches the same result on the Great Northern Railway when it uses a mile of movement as a measure of service performed inside and outside the state. The company has to furnish twice as much fixed plant—more tunnels and bridges, heavier rail and grading and extensive terminals, and large repair shops in order to produce a mile of service outside the state. For this reason alone, a mile of movement is not an accurate measure by which to compare total service performed inside and outside the state. But in addition to furnishing more fixed plant, the company furnishes more auxiliary service outside the state, such as terminal service and repair work, for every mile of movement. The outside miles of movement represent a greater total volume of service, and to assume equality in and out of the state for the purpose of assessment, assesses outside property just as much as does the track mile ratio.

Run a train over the entire system and the engine mile ratio, car mile ratio, ton mile ratio and gross earnings ratio (on a mileage prorate) will all be identical for every state with the track mile ratio. The track mile ratio controls and fixes the others and they simply repeat the track mile ratio, with all its errors, under another name. Where a shipment uses only a part of the system, the ratio of miles of movement is identical with the track mile ratio for that part of the system and repeats its errors. It is true that miles of movement on parti-

cular parts of the system reflect varying volumes of service to some extent, but only in a misleading and inaccurate way, because the miles of movement in one state may be larger in number but smaller in total volume of service than in another. Witness the iron ore lines, where Minnesota has nine times as many miles of movement as Wisconsin, but only an equal total volume of service.

This is the situation in North Dakota on the Great Northern Railway. It may not exist on any other railroad and it may not exist in any other state. It was not shown to exist on the C. & N. W. Ry. in Wyoming in the Rowley case. But it is shown here without dispute that car and engine miles in North Dakota carry less traffic and perform less service; that all of the traffic miles require less fixed plant; and that they all involve less effort as measured by operating cost; and that miles operated in the large terminals outside the state were not counted.

If traffic miles, or a composite of traffic miles and track miles afford an infallible or even reliable ratio, in spite of such proof as we have offered here, it follows that on our iron ore carrying lines, the $16,000,000, 90 mile line in Minnesota is worth nine times as much as the $16,000,000, 10 mile plant in Wisconsin, merely because it is spread out more thinly over more miles. As a matter of fact, the ten miles in Wisconsin contain as much fixed plant and, including dock service, terminal switching, shop repairs, etc., they furnish as much total service as 90 miles in Minnesota. Wisconsin provides nine times as much plant and nine times as much service per mile. Either a track mile or a traffic mile in Wisconsin is equivalent to nine in Minnesota, and a mileage ratio, for assessment purposes would rob Wisconsin and credit Minnesota with several million dollars worth of property. The undisputed evidence here shows

that the same situation exists as between North Dakota and the balance of the Great Northern system. The distortion is not so grotesque, merely because it is spread over more miles, but the effect is the same.

In *Union Tank Line Co. v. Wright,* 249 U. S. 275, at 282-3, this court said:

> "But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both. *Western Union Telegraph Co. v. Massachusetts,* 125 U. S. 530; *Marye v. Baltimore & Ohio R. R. Co.,* 127 U. S. 117; *Pullman's Palace Car Co. v. Pennsylvania,* 141 U. S. 18, 26; *Adams Express Co. v. Ohio,* 165 U. S. 194; s. c. 166 U. S. 185; *American Refrigerator Transit Co. v. Hall,* 174 U. S. 70; *Union Refrigerator Transit Co. v. Lynch,* 177 U. S. 149; *Fargo v. Hart,* 193 U. S. 490; *Cudahy Packing Co. v. Minnesota,* 246 U. S. 450, 453.
>
> In the present case the Comptroller General made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310—the challenged assessment specified $291,196.
>
> We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of

the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

CONCLUSION.

We submit in conclusion that the Circuit Court of Appeals, in requiring us to negative the use of other methods, in addition to proving the use of the mileage prorates, was at variance with the principles established in *Pennsylvania Railroad Company v. Jacoby & Co.*, 242 U. S. 89, and that it overlooked the barrier against such negation established in *C. B. & Q. R. R. Co. v. Babcock*, 204 U. S. 585; and that it erred in failing to find from the pleadings and the undisputed evidence, that the Board of Equalization in fact gave controlling weight to the mileage prorates in allocating system value to the state, and that this necessarily resulted in assessing property outside the state, and was unlawful under the decisions in *Wallace v. Hines*, 253 U. S. 66, and similar cases.

And, irrespective of unlawfulness in the method of allocation, we submit that the Circuit Court of Appeals should have found an assessment of $78,832,888.00 to be arbitrary, where the value based on earnings and stock and bond prices for the three depression years preceding the assessment is only $23,937,317.00; where the state's own expert, by including boom year figures and allocating on mileage prorates, computes the value at only $63,307,629.00, by the method claimed by the state to be the best and most accurate; where he concedes that he has been unable to find any method by which a value equal to the assessment can be computed; and where the assessment is identical with that for 1932, which wholly ignored the shrunken earnings and reduced stock and bond prices of 1932 and 1933, and was based entirely on data for the year 1927 to 1931. We submit that under the decisions in *A. T. & S. F. Ry.*

Co. v. United States, the court should have found that the Board acted beyond the range of permitted discretion in assessing depression values at prosperity levels.

Respectfully submitted,

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C. J. MURPHY,
Solicitors for Petitioner,
175 E. 4th St.,
St. Paul, Minn.

Dated at St. Paul,
Minnesota, June 17, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE AS AUDITOR and L. T. HALVORSON AS TREASURER OF BARNES COUNTY, et al., all of the STATE OF NORTH DAKOTA,
Respondents.

BRIEF ON BEHALF OF PETITIONER.

F. G. DORETY,
C. J. MURPHY,
Solicitors for Petitioner,
175 E. 4th St.,
St. Paul, Minn.

November 2, 1935.

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor, W. D. Conway as Treasurer and Bert M. Salisbury as Auditor-elect of Benson County; Ole Colbornson as Auditor, Sam H. Wilson as Treasurer, C. E. Hurst as Auditor-elect and Arlan Stair as Treasurer-elect of Bottineau County; H. F. Magedanz as Auditor, Jerry Donovan as Treasurer and Thomas P. Borgen as Treasurer-elect of Burke County; F. Ford Doherty as Auditor, C. A. Baumgartner as Treasurer and Paul H. Eddy as Treasurer-elect of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor, H. J. Oberman as Treasurer and Harry Bjornstad as Treasurer-elect of Dickey County; R. H. Lynch as Auditor, O. A. Steffler as Treasurer, Myrtle Skabo as Auditor-elect and Albert T. Heide as Treasurer-elect of Divide County; S. W. Lyman as Auditor, Hugh Peoples as Treasurer and S. K. Haugland as Auditor-elect of Eddy County; J. B. McWethy as Auditor, M. P. Roberts as Treasurer and Alice Cole as Treasurer-elect of Foster County; Martin O. Haugen as Auditor, John Sandbek as Treasurer and Albert Brenna as Treasurer-elect of Grand Forks County; P. A. Melgard as Auditor, R. J. Howden as Treasurer, R. J. Howden as Auditor-elect and H. B. Nelson as Treasurer-elect of Griggs County; E. W. Olson as Auditor

and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor, Oluf Erickson as Treasurer and O. M. Fritsvold as Treasurer-elect of McKenzie County; F. J. Haines as Auditor, Nels Hofland as Treasurer, M. L. Glarum as Auditor-elect and Sadie Hofland as Treasurer-elect of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor, J. H. Hannesson as Treasurer and Norval W. Hodgson as Treasurer-elect of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor, W. C. Budke as Treasurer, W. E. Coutts as Auditor-elect and Einar Johnson as Treasurer-elect of Renville County; George J. Fischer as Auditor, Karl L. Mikkelson as Treasurer and Einar Vohnson as Treasurer-elect of Richland County; Jas. H. Penny as Auditor, Allister McKay as Treasurer and E. M. Anderson as Treasurer-elect of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. J. Mustad as Auditor, Florence Carlson as Treasurer and Ella B. Johnson as Treasurer-elect of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortenson as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents.

BRIEF ON BEHALF OF PETITIONER.

The petition filed by the Great Northern Railway Company seeking a review on a writ of certiorari of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in cause number 10221 in equity, entitled Great Northern Railway Company, Appellant vs. J. J. Weeks, State Tax Commissioner, et al, Appellees, was granted by this court on October 14, 1935.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of North Dakota has not been officially reported but the decree appears at page 53 of the record.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit dated April 25, 1935, is reported in *Great Northern Railway Company vs. Weeks, State Tax Commissioner, et al,* 77 F. (2d) 405, and appears on pages 310 to 326 of the record.

II.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on April 26, 1935 (R. 327) less than three months prior to the date of application for the writ of certiorari in this court (U. S. Code, Title 28, Sec. 350).

The jurisdiction of the Supreme Court is invoked under paragraph A of Section 240 of the Judicial Code, as amended and re-enacted by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

Federal Jurisdiction exists under Section 41(1) of the Judicial Code covering diversity of citizenship. Plaintiff is a cor-

poration organized under the laws of Minnesota and defendants are all citizens and residents of North Dakota. The amount or value in dispute excluding interest and costs exceeds the sum or value of $3,000.00 as to each of the defendants. Plaintiff alleged that the assessment and levy in question violate the Constitution and Laws of the United States in that they would take plaintiff's property without due process of law and impose an arbitrary and unreasonable burden on interstate commerce.

Equity jurisdiction is based upon the fact that there is no adequate remedy at law, which is not seriously disputed. The lower courts did not question their equity jurisdiction.

Wilson County Collector, et al. v. Ill. So. Ry. Co., 263 U. S. 574, 44 S. Ct. 203.

Appeal to the Circuit Court of Appeals was taken under Section 225(a) of the Judicial Code.

III.

STATEMENT OF THE CASE.

This is an action in equity brought in the United States District Court for the District of North Dakota by the Great Northern Railway Company, petitioner herein, against 83 tax collecting officers of the state and of various counties of North Dakota, respondents herein, to contest an assessment of $78,832,888 by the State of North Dakota against the property of the petitioner Great Northern Railway Company for the year 1933 and to restrain the collection of a tax levy of $1,508,352.34. The trial was by the court and decree was rendered against petitioner, plaintiff below, and in favor of the respondents, defendants below. An appeal from said decree was taken

by petitioner to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the decree of the district court.

The constitution and laws of North Dakota require that all property including that of railway companies be assessed "at its true and full value in money", Section 2122, Supplement to 1913 Compiled Laws, 1913-1925. For the complete language of the constitution and laws of North Dakota on this subject see paragraph IV of the Complaint (R. 3, 5).

At the average market price for the year 1932 immediately preceding the assessment, the total aggregate value of all of the petitioner's stocks and bonds was $296,301,177.00 (Ex. B, R. 251). Of this amount the state agrees that 30.29% represented the value of non-operating assets not forming any part of the railroad system (Ex. I, R. 265). This leaves the sum of $206,551,551.00 as the value of the entire railroad system as indicated by current stock and bond prices.

The net railway operating income for the three years preceding the assessment, capitalized at 6%, produces an "earnings value" for the entire railroad property of $199,291,550.00 (Ex. 22, R. 246). Careful analyses of future earnings possibilities indicate that there is no reason to expect that the property will ever earn more than 7% on a system value of $200,000,000 (R. 65-70; 121-122).

Less than 1/7 of the entire physical plant (as measured by reproduction cost) is located in North Dakota (Ex. N, R. 273). This 1/7 of the plant had less than average traffic density and originated less than an average amount of traffic (Exs. 13, 14, R. 241). A comparison of net earnings, computed by what we believe to be a scientific and accurate method indicates that the property in North Dakota had less than 1/8 of the total net earning capacity of the system (Ex. 12, R. 237).

These facts indicate an actual commercial value for the property in North Dakota in 1933 of something like $25,000,000, while the assessment was $78,832,888.00. This assessment is nearly 40% of the actual commercial value of the entire system as indicated above, while only 1/7 or ⅛ of the system value is actually located in North Dakota.

It will be noted that the assessment appears to be a computed sum in odd dollars and not an estimate in round figures. The only explanation in the record for the precise amount of the 1933 assessment was the fact that it was identical as to amount per mile with the assessment for the prior year 1932 (R. 81), which in turn had been brought down with only a 5% reduction from the assessment for the boom year 1929 (Ex. O, R. 275). In other words, the 1933 assessment appears to have been an inheritance from the past.

Upon the trial the state attempted to support a valuation of at least the amount of $63,307,629.00 (which is about $15,000,000 less than the assessment) by certain computations of value (Ex. P, R. 277). For the excess in the assessment above the various values computed by the state, there is not even a pretense of justification in the entire record except the allegations in the answer that it was a matter of "judgment".

Both the 1932 assessment (which was adopted for 1933) and the 1933 value of $63,307,629.00 computed by the state far exceed the figure of $25,000,000 which we have suggested above as a sound commercial appraisal. Our explanation of this astonishing difference is first, that the state gives controlling weight to earnings and stock and bond prices of the boom years 1927, 1928 and 1929, and thereby assesses values of the pre-depression boom period which had long before ceased to exist; and second, that the state's computations not only value the property actually located in North Dakota but an additional

fifteen or twenty million dollars worth of terminals and mountain construction actually located in other states; and third, that some $15,000,000 is added without any explanation or justification.

The contention that property actually located in other states is included in the North Dakota assessment is supported by the fact that while North Dakota contained only 13.85%, or less than 1/7 of the physical plant, and while this portion of the physical plant had less than average traffic density and use value, North Dakota nevertheless assesses 18.34% of the system value. She has assessed not only the 13.85% actually located in North Dakota but an additional 5% located outside. This is accomplished by the use of certain mileage prorates of system value, which spread terminal values and mountain construction over the intermediate prairie states. It is (1) the assessing of pre-depression values which no longer exist, (2) the assessing of terminal values and mountain construction outside the state, and (3) the arbitrary addition of $15,000,000 without any pretense of justification which bring the total assessment up to $78,832,888.00.

The courts below held that it lay within the broad discretion of the taxing authorities to adopt such methods of valuation as this and that the court had no power to correct them; and that not even the entirely unjustified excess of $15,000,000 in the assessment, above actual value, would entitle the taxpayer to relief, in the absence of other proof of an actual fraudulent intent. Judge Sanborn stated that while he had no doubt that the property was overvalued, he felt that the power of the court had been so "circumscribed" by decisions of this court that it had no power to grant relief.

The Circuit Court of Appeals also held that *it was not sufficiently proven as a fact* that the taxing authorities had based

their assessment upon earnings and stock and bond prices of 1927-1931, or that they had in fact used the mileage prorates in apportioning system value to North Dakota. While the pleadings *specifically admit* that *both* of these methods of computation were used, the actual assessment varied by a few dollars from the precise result of these computations. The Circuit Court of Appeals seems to have held in effect that methods of computation resulting in doubling or trebling the actual value of the property, and in assessing fifteen or twenty million dollars worth of outside terminals may be used with impunity, so long as the taxing authorities add or subtract a few dollars, as an act of "judgment", before placing the amount on the assessment rolls.

Our contentions are:

(1) That the actual use by the Board of Equalization of the pre-depression figures and of the mileage prorates, is conclusively established by the evidence and admitted in the pleadings; that these methods trebled the actual value of the property; that they resulted in levying a large part of the assessment against pre-depression values which had ceased to exist and that they levied nearly 1/3 of the assessment against property actually located outside the state; and that after computing a value by such methods as this, the addition or subtraction of a few dollars before entering the amount on the assessment rolls affords no immunity.

(2) That methods resulting in the assessment of pre-depression values and out-state properties and in determining values of an obsolete period and of properties located in other states, and the further addition of $15,000,000 arbitrarily, are not within the discretion of the taxing authorities, but are subject to correction or control by the courts.

(3) That an admitted over-valuation of $15,000,000, and a confessed inability to justify it on any rational basis is in itself sufficient to show that the assessment must have been irrational and therefore arbitrary, and calls for relief without any other proof of fraudulent intent or improper method.

We know of no decisions of this court which so "circumscribe" the power of the lower courts that they cannot give relief in such a case; on the contrary we believe that several decisions of this court require that relief be granted under these conditions. In the case of *Rowley v. Chicago & North Western Ry. Co.*, 293 U. S. 102; 55 S. Ct. 55, and we think in every other case in which railway assessments have been sustained by this court, some sort of a computation had been made by the tax authorities and offered in evidence, or some sort of an attempted justification of the amount of the assessment had been made, indicating that taxing authorities had at least made an attempt in good faith to determine a value by some process which they considered rational. We believe this to be the first railroad tax case ever presented to this court, where the defendants attempted to justify the assessment and virtually confessed their inability to discover any rational process by which a valuation equal to the assessment could be computed. In this case the defendants' tax expert said that he had spent months of study on the matter and that "in all that time, I was not able to find any method of computation that would produce a value to North Dakota equal to the assessment for 1933 by any usually accepted method" (R. 190). In this respect, we submit that this case presents a situation which has never before been passed upon by this court. In addition to this, we believe that the pleadings themselves require a finding of fact that the assessment was based upon pre-depression values and mileage prorates; and a conclusion of law that such methods, when they re-

sult in trebling the value of the property, are not within the discretion of the taxing authorities.

IV.

SPECIFICATIONS OF ERROR.

(1) The Circuit Court of Appeals erred in failing to find that the assessment was more than double the actual value of the property and in failing to set aside the assessment on that ground.

(2) The Circuit Court of Appeals erred in permitting a range of discretion to the Tax Board sufficient to allow it to substantially ignore depression values and reduced economic levels and to base its assessment upon boom period values.

(3) The Circuit Court of Appeals erred in holding that plaintiff, in addition to proving the use of mileage prorates, must negative the use of any other possibly lawful method.

(4) The Circuit Court of Appeals erred in failing to find that the use of a wrongful method or arbitrary action was sufficiently established by the plaintiff's evidence of excessiveness plus the unsuccessful attempt of the state to justify the assessment; by the confession of the state's only witness that the assessment was 25% in excess of value computed by the "best and most accurate method", and that he knew of no method by which it could be justified.

(5) The Circuit Court of Appeals erred in holding that there is no basis for finding that property without the state has been assessed, unless the Board of Equalization adopted the "exact result" of a computation which included such outside values.

(6) The Circuit Court of Appeals erred in holding that there was no evidence of any deliberately arbitrary or wrongful assessment concerning years prior to 1933.

(7) The Circuit Court of Appeals erred in holding that any unlawfulness in the 1932 assessment was not necessarily carried over when the same assessment was adopted for 1933.

(8) The Circuit Court of Appeals erred in holding that it was not sufficiently established by the pleadings and evidence, that mileage prorates were in fact used in making the assessment, and that the Board of Equalization was guided or largely influenced by such computations.

(9) The Circuit Court of Appeals erred in holding that the proof of unlawfulness in the mileage prorate method of assessment depended upon proof that the only approximately true method of allocation was one based on "expense of operation".

(10) The Circuit Court of Appeals erred in holding that there is any evidence in this case that a 4% rate for capitalizing earnings would have been justified in 1933 and in failing to hold that 7% was not the minimum rate permissible under the evidence.

(11) The Circuit Court of Appeals erred in failing to find that the State of North Dakota by the use of mileage prorates had assessed many millions of dollars worth of property located in other states.

(12) The Circuit Court of Appeals erred in affirming the decision of the District Court and in entering judgment against the petitioner and in favor of the respondents.

(13) The Circuit Court of Appeals erred in not entering judgment in favor of the plaintiff as prayed for in the complaint.

V.

ARGUMENT.

Points Relied Upon.

A. The adoption of a prior year's assessment for 1933, the use of five years earnings and stock and bond prices to determine system value and the apportionment of system value to North Dakota by the use of mileage prorates were not only proven but were specifically admitted by the pleadings.

1. *The precise amount of the 1933 assessment was fixed by that of the 1932 assessment, which was adopted for 1933.*

2. *The amount of the 1932 assessment as originally made and, therefore, as adopted in 1933, was determined from earnings and stock and bond prices of the years 1927 to 1931 and by the use of mileage prorates of system value.*

B. In basing the assessment upon earnings and stock and bond prices of 1927 to 1931, the Board was in effect assessing values of an obsolete period which were no longer in existence in 1933.

C. Of the total amount of the assessment, approximately $20,000,000 was levied against properties outside the state and beyond its jurisdiction.

1. *The North Dakota trackage consists largely of relatively cheap branch lines. The more valuable terminals and more costly mountain construction are located outside the state.*

2. *The outside terminals and costly mountain construction, while concentrated in short mileage contribute as*

much to transportation service and to system value in proportion to cost and volume of plant as do the cheaper portions of the road where the same investment is spread over more miles.

3. The right to assess and tax each portion of a railway system belongs solely to the state where that portion is located.

4. The factors used in the North Dakota computations unlawfully credit to North Dakota values of terminals and mountain construction actually located in other states.

D. Where the use of unlawful methods by the taxing officers has been shown, it is not incumbent upon the taxpayer to submit a proper method of computation or to prove the correct amount that is due.

E. Even assuming that no wrongful methods were shown and that there was no evidence whatever as to what methods were used, the facts that the assessment is treble the current value of the property and that the defendants confess their inability to justify it by any rational process are sufficient to prove arbitrary action.

F. The economic emergency does not justify the violation of the statute requiring the assessment of property at its full and true value in money.

A.

The adoption of a prior year's assessment for 1933, the use of five years earnings and stock and bond prices to determine system value and the apportionment of system value to North Dakota by the use of mileage prorates were not only proven but were specifically admitted by the pleadings.

The question whether these methods would be unlawful is, of course, wholly irrelevant in this case unless it is first shown

that they were in fact used in determining the assessment. If they were not used, it is immaterial whether their use would be unlawful.

The entire opinion of the Circuit Court of Appeals consists of a labored effort by the court to show that, in spite of the specific admissions in the pleadings that these methods had in fact been used, nevertheless their use is not sufficiently shown. It is necessary, therefore, to first resolve this question, as to whether a prior year's assessment was in fact adopted for 1933 and as to whether five years earnings and stock and bond prices and mileage prorates were in fact used in determining the assessment.

1. *The precise amount of the 1933 assessment was fixed by that of the 1932 assessment, which was adopted for 1933.*

Paragraph X of the Complaint (R. 8) alleges "said Board of Equalization * * * adopted the 1932 assessment as and for its 1933 assessment and made no deduction or decrease whatever except $17,136.00 which was due to the removal of a small amount of plaintiff's trackage in North Dakota. The assessment per mile remained the same as for 1932 and the total assessment for 1933 was $78,832,000.00".

Paragraph G of the Answer (R. 26) which replies to paragraph X of the Complaint, does not deny this but alleges that the Board had statistics and other evidence of value before it in 1933, and that the assessment as actually adopted represented its honest judgment as to value.

The assessment is in odd dollars and not in round figures. It clearly appears to be the result of some kind of a mathematical computation or process and not of a rough estimate or guess. The amount is the *exact amount* which would be reached by

multiplying the 1933 mileage by the 1932 assessment per mile (R. 81). No other computation by which that precise figure might have been produced is shown or even hinted at. The allegation of the Complaint that the Board in 1933 adopted the 1932 assessment as and for its 1933 assessment is not denied. The allegations in the Answer that the Board also had other evidence before it and that the amount represented its honest judgment of the value, are in no way inconsistent with our contention that the method by which the precise amount of $78,832,888.00 with its odd dollars was arrived at was by adopting the assessment of 1932.

Various computations of value made after the assessment, and made for use as evidence in this suit, were offered by the defendants in its Exhibit P, but all of these computations are many million dollars short of the assessment. This Exhibit P was prepared by Mr. Baker, a tax specialist employed by the state, and for thirteen years a Deputy Tax Commissioner of the state, who testified that he had spent several months in preparing the exhibits and that "in all that time I was not able to find any method of computation that would produce a value to North Dakota equal to the assessment for 1933 by any usually accepted method" (R. 190).

He also testified "I believe it is correct that schedule 4 on Exhibit P showing the five factor ratio is the one which is advocated by the state as the fairest basis of allocation. That shows the 1933 assessment to be 24½% in excess of my computed value by the composite method in schedule 4" (R. 189). The computed value just referred to was $63,307,629.00 while the assessment was $78,832,888, an excess of $15,500,000 (Exhibit P).

It thus appears that there is no computation of value which will account for the amount of the 1933 assessment, except by applying 1932 assessment figures to the 1933 mileage.

Notwithstanding all this, the Circuit Court of Appeals finds "that there is no evidence as to how the Board reached its result in 1933 or prior assessments". We submit that any one who remains in doubt after this showing as to how the precise amount of the 1933 assessment was arrived at is guilty of a hair-splitting refinement which has no foundation in sound principles of logic.

In *Pennsylvania Railroad Company v. Jacoby & Co.*, 242 U. S. 89, 37 S. Ct. 49, the railroad company was attacking a reparation award of the Interstate Commerce Commission which, like the assessment in question here, was presumed to be lawful. The proof consisted simply in showing that the amount of the award was identical with the amount of a computation contained in a certain Exhibit 10, which had been introduced before the Commission by one of the parties, and which the court held would be an unlawful method of computation.

In that case the railroad company had not produced in court the entire record made before the Commission. It appeared that the Commission had had before it, evidence other than that which was produced in court, and the railway company failed to negative the possibility that some of the other evidence might have been sufficient to justify the award by some lawful method of computation. For this reason, the plaintiff took the position, which the Circuit Court of Appeals took in our case, and urged that under the presumption of lawfulness, the railway company's attack upon the award was inadequately supported. This court said on page 99:

> "It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as award-

ed and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

We submit that under this decision, the Circuit Court of Appeals was mistaken in assuming that the identity of the 1933 assessment per mile with that for 1932 was not evidence of the method by which the 1933 assessment was computed, and in stating that there was no evidence as to how the Board reached its results in 1933. In the absence of anything else in the record tending to cast a doubt upon this conclusion, we submit that it is controlling.

It follows that if we are to determine how the amount of the 1933 assessment was originally obtained, we must go back to 1932 when that amount was first computed.

2. *The amount of the 1932 assessment as originally made and, therefore, as adopted in 1933, was determined from earnings and stock and bond prices of the years 1927 to 1931 and by the use of milage prorates of system value.*

Upon this point we have the specific admission of the state in paragraph G of its Answer (R. 26), which reads as follows:

> "Answering Paragraph X of plaintiff's Complaint, the defendant admits that in the year 1932 the State Tax Commissioner did present to the State Board of Equalization computations based upon a determination of the system value of the railroad by the use of a composite of the average stock and bond values of the plaintiff for a period of *five years preceding the assessment*, and the average value ascertained by capitalizing net earnings *for five years preceding the assessment* and by applying and allocating such system value to the State of North Dakota upon the basis of the five factors set forth in Paragraph IX of the Complaint, which said formula produced a value of $76,115,715.00; that he also made an allocation of the same system value to North Dakota by another method, using for the purpose of allocation only factors numbered 3, 4 and 5 in said list which produced a value of $79,417,825.00. In addition thereto defendants allege that the Tax Commissioner presented the computations based upon a third method of allocating the system value by which he applied the average of the factors numbered 1, 3, 4 and 5 in the above list which produced a valuation of $80,671,790.00. Defendants further allege that *upon this evidence* and upon all other evidence and matters of common knowledge before it the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024.00." (Italics ours).

These three computations of $76,115,715.00, $79,417,825.00 and $80,671,790.00, have an arithmetical average of $78,735,110.00. The 1932 assessment of $78,850,024 is very close to this arithmetical average.

It will be noted that paragraph G just quoted states that the system value was allocated to North Dakota "upon the basis of the five factors set forth in paragraph IX of the Complaint",

and also upon the factors numbered 3, 4 and 5 and the factors numbered 1, 3, 4 and 5 in said list. The factors referred to in paragraph IX of the Complaint (R. 8) are as follows:

"(1) Miles of all track.

(2) Amount of physical property as measured by cost of reproduction less depreciation.

(3) Cars and locomotives moved one mile.

(4) Tons of freight and passengers moved one mile.

(5) Gross earnings, the gross earnings in North Dakota being computed by adding to the revenues in North Dakota from intrastate traffic a proportion of the revenue from all interstate traffic passing into or through North Dakota equal to the proportion which the miles of track in North Dakota used for moving such traffic bore to the total miles of track used for moving such traffic."

It will also be noted that paragraph G above quoted states that the system value was determined from earnings and stock and bond prices "for a period of five years preceding the assessment". The assessment here referred to is the 1932 assessment and the five preceding years were the years 1927 to 1931, inclusive.

The Circuit Court of Appeals makes the amazing finding that in spite of this admission in the Answer, it is not sufficiently shown that the methods of computation referred to were used in making the assessment of 1932. The *sole basis* for this strange finding, seems to be the fact that the assessment was not in the *exact amoun* of any one of the three computations, nor in the exact amount of their arithmetical average.

The trial court had made a finding that the Board "never has adopted the *exact result* of any of said tables, formulae or methods of computation of railroad valuations" and the Cir-

cuit Court of Appeals said "if this finding is sustained by the evidence, there is no basis for the issue that out-state property is included in the assessment." In other words, it is held that unless the "exact result" of the unlawful computation is adopted as the assessment, there is no basis for contending that it was used at all, or that any unlawful result was accomplished.

The court holds in effect that even though the Board makes its computations by methods which would tax values no longer in existence, and which would tax out-state property, and which would be unlawful, it can immunize the assessment against attack by adding or subtracting a few dollars before entering the amount upon the assessment rolls. To us this is a most astonishing conclusion. The Circuit Court further says "we think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method, and, therefore, is in no position to urge the contention that property outside the state has been brought into this assessment". The court further says "there is no evidence of what use was made by the Board of any formula either in 1933 or prior years; that there is no evidence as to how the Board reached its results in 1933 or prior assessments".

In view of the specific admissions in the Answer, we submit that this is a most amazing conclusion. The holding seems to be that unless the wrongful formula is officially "adopted" by some resolution of the Board declaring that that is its sole official method of computation, or unless the assessment is in the exact amount of some one of these computations, the court will presume that the Board was not "guided" or was not even "largely influenced" by the use of the computations, but that it had some other secret method or formula known only to itself, and which the court will presume to have been lawful, by which the assessment was reached.

The taxpayer must assume a double burden. In addition to *affirmative* proof that the assessment was determined by unlawful methods, he must submit *negative* proof that it was not determined by lawful methods.

The Board's own expert witness, Mr. Baker, testified that after several months of study, he had been unable to discover any lawful method or formula which would support the assessment, and none was known to him (R. 190). Annual reports of the State Tax Commissioner have stated that it had been the practice for many years to fix the assessments by the use of these particular methods. These reports are not in the record but they are public documents of which the courts will take judicial notice. We quote from two of these reports in Appendices A and B of this brief. All of the computations submitted by the state in Exhibit P, in support of the assessment, are based upon these methods or some combinations of them. There is no suggestion in the record that any other method of computation was ever known to or considered by the state. Paragraph G of the Answer which admits the use of these computations does not suggest any other specific methods which were or might have been used. In view of all this, we submit that the Circuit Court of Appeals was plainly in error in stating that "appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method" and in stating "that there is no evidence as to how the Board reached its results in 1933 or prior assessments".

The court suggests that we might have summoned the members of the Board as witnesses. However, in *C. B. & Q. R. R. Co. v. Babcock*, 204 U. S. 585, 27 S. Ct. 326, this court held that members of the Board have the immunity from examination of

jurors if not of judges and cannot be called for examination as to their mental processes. In view of this decision, it seems very doubtful whether we could have called the members of the Board as suggested by the Circuit Court of Appeals. But assuming that we had called them, and they had testified that they had made three computations as set forth in paragraph G of the Answer and had then adopted a "judgment" figure based upon these computations and upon other general knowledge, we submit that this would have proved no more than is already admitted in the answer, and that it would have been sufficient for our case. Paragraph G of the Answer (R. 27) says "Defendants further allege that *upon this evidence*" (the three computations based upon five year figures and mileage prorates) "and upon all other evidence and matters of common knowledge before it, the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024.00." Here is an express admission that the assessment was in part at least based "upon this evidence" (the mileage factors) and yet the Circuit Court of Appeals says that "there is no evidence as to how the Board reached its results" and that "appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method".

The state's valuation of $63,307,629.00 in Exhibit P which was itself $15,500,000 less than the assessment, as well as all of the other valuations in that exhibit, was based upon the use of five year figures and various mileage prorates. If we are to assume with the Circuit Court of Appeals that neither the assessment nor the valuation upon which it was based were guided or influenced by mileage prorates, we must, if we are to be consistent, eliminate mileage prorates from Mr. Baker's computations of value which were offered to justify the assessment.

If these mileage prorates are eliminated, we are left with his system value of $345,188,820.00 for 1933 and with the fact that less than 1/7 of the plant is located in North Dakota. This would indicate a North Dakota value (based upon pre-depression earnings and stock and bond prices) of only $49,000,000 and would leave some $30,000,000 of the assessment entirely without any pretense of justification, instead of only $15,000,000. It is only by using the mileage prorates that Mr. Baker obtains a computed value as high as $63,000,000 and that he reduces the arbitrary addition to as little as $15,000.000. If the Circuit Court of Appeals is right and if we are to assume that mileage prorates had nothing to do with the matter, then the state is left with the burden of explaining an arbitrary excess of $30,000,000 above any amount that the state could compute, even on the basis of pre-depression prices, without the use of mileage prorates.

We submit that a court of equity should not divorce itself from the ordinary processes of common sense and should not bow down and worship at the shrine of empty and misleading technicalities. We submit that no reasonable man in the exercise of ordinary common sense can doubt, after reading paragraph G of the Answer, and the other evidence referred to above, that the 1932 assessment was not only guided and largely influenced by the five year figures and the mileage prorates but that it was entirely controlled by them, and could not have been determined in any other way. To hold that this has not been sufficiently proven because we did not negative the possibility that there may have been some other lawful computations before the Board, when the state's own witness confesses that after diligent search extending over several months he has been unable to discover any, and when it clearly appears that there

are no possible lawful computations by which such a result could be reached, is to carry the refinements and technicalities of reasoning to an extent that would have shamed the mediaeval schoolmen.

We have gone into this question at greater length than it deserves because it is the sole basis for the adverse decision of the Circuit Court of Appeals. Feeling confident that this court will reach the conclusion that the use of the five year figures and the mileage prorates is not only proven but admitted, we proceed to discuss the effects of this method of computation in crediting North Dakota with values which had ceased to exist, and with values of properties actually located outside the state.

B.

In basing the assessment upon earnings and stock and bond prices of 1927 to 1931, the Board was in effect assessing values of an obsolete period which were no longer in existence in 1933.

We have seen that the 1932 assessment, which was adopted for 1933, was based upon earnings and stock and bond prices for the years 1927 to 1931. The earnings for these five years and for the following year 1932 were as follows (Ex. D, R. 255):

1927	$29,202,540
1928	31,294,069
1929	32,457,523
1930	21,912,508
1931	12,669,420
1932	1,290,551

It will be noted that in 1932, the last year immediately preceding the 1933 assessment, which is now in issue, the system earnings had fallen to $1,290,551, or about 5% of the 1929 earnings. The 1932 assessment was made in September, 1932, before the amount of the 1932 earnings was known, and therefore, of course, no effect was given to these shrunken 1932 earnings in the 1932 assessment. And when the same assessment was adopted a year later for 1933, it follows that while the low 1932 earnings had then become known, no effect was given to them and the dominating figures in the valuation continued to be those of the years 1927 to 1931 (1927 being six years before the 1933 assessment).

The total corporate stock and bond prices (of which 30.29% represented non-operating assets not forming a part of the railroad system, Ex. I, R. 265) for the years 1927 to 1932 were as follows (Ex. B, R. 251):

1927	$590,508,029
1928	606,649,827
1929	609,626,431
1930	571,294,190
1931	461,845,051
1932	296,301,177

It will be noted that the total sytem stock and bond prices (including non-operating assets) had fallen from $606,000,000 in 1929 to $296,000,000 in 1932 or less than half. But the 1932 figure was not considered in making the 1932 assessment. Exhibit G of the Answer quoted above shows that the figures which were used were those of the years 1927 to 1931. And since no effect was given to this reduced value in the 1932 assessment, it follows that no effect was given to it in 1933 when the same assessment was adopted, although by that time the

1932 figures were complete and were well known. The 1933 assessment was, therefore, in effect based upon stock and bond prices of the years 1927 to 1931, ignoring the greatly shrunken values of 1932.

The average of the earnings for the five years 1927 to 1931 was $25,507,192.00. The average of the earnings for the three years 1930 to 1932, immediately preceding the 1933 assessment was $11,950,826.00. In other words, the 1932 assessment (and therefore the 1933 assessment which was in the same amount) was based upon the earnings average of a five year period commencing six years before the 1933 assessment and omitting the immediately preceding year, and which was more than double the average of the three years immediately preceding the assessment and twenty times that of the single year immediately preceding. This indicates the excessive and dominating weight given to the boom period earnings of 1927, 1928 and 1929 in fixing an assessment for 1933, and the complete ignoring of the shrunken depression earnings.

The average of the stock and bond prices for the years 1927 to 1931 was $567,984,705.00 and the peak figure was the 1929 price of $609,626,431.00, while the price had fallen in 1932 to $296,301,177.00, of which only 68.71% represented railroad value. The later figure, as pointed out above, was given no weight in the 1932 assessment and, therefore, none in the 1933 assessment (although by that time it was well known) while dominating effect was given to the boom prices of 1927, 1928 and 1929.

An appraiser valuing securities for probate or other purposes and finding them actually selling currently at $20 a share in 1933, would scarcely be permitted to appraise them during that year at $60 a share, merely because they had sold six years before at $100 a share, or because $60 was a five year

average. He would not be permitted to value securities far above their actual current buying and selling price merely because in past years they had had a higher value which no longer existed. And yet in this case the taxing authorities acted even more irrationally than this, because they gave no weight whatever to current figures, either for 1933 or 1932, and gave dominating weight to the large figures which had existed four, five and six years before the date of the assessment.

It is admitted in paragraph L of the state's Answer (R. 31, 32), that if independent computations had been made for 1933, by the methods used in 1932 and described in paragraph G of the Answer (except that these methods would be applied to the reduced figures for the five years ending in 1932 instead of to the five years ending in 1931), the computed value for 1933 would have been reduced by approximately $13,000,000, and in spite of this no reduction whatever was made in the 1933 assessment.

Petitioner's gross revenues had fallen from $126,000,000 in 1928 and 1929 to $55,000,000 in 1932. The traffic had fallen from 10,000,000,000 revenue net ton miles in 1928 and 1929 to 4,000,000,000 in 1932 (R. 65). A careful and thorough analysis of Great Northern traffic commodity by commodity, and of permanent changes which had taken place in transportation conditions, indicated that this shrinkage was due only in part to the depression and that about half of it was due to permanent changes in traffic conditions which would persist even after the end of the depression and after a resumption of normal general business conditions throughout the country. The permanent changes resulted from diversion of traffic to the Panama Canal, highway vehicles, pipe lines, aeroplanes, etc., to various changes in commercial and agricultural methods which tended to shorten railroad hauls, and to very drastic rate reductions which were due in part to action by the Inter-

state Commerce Commission and in part to voluntary action by the carrier taken in an effort to hold its remaining traffic against further diversions to competing forms of transportation. This analysis appears on pages 65 to 70 of the record and concludes with an estimate that half of the shrinkage since 1929 is permanent and that the company could not reasonably hope for gross revenues in excess of $86,000,000, even after the end of the depression.

Based upon this amount of gross revenue, the General Auditor of the company made a careful analysis of permanent changes which had occurred in operating expenses and estimated that the company could not reasonably expect to earn a net railway operating income of over $14,000,000, even after a return of normal general business conditions (R. 121, 122).

The permanence of this shrinkage in railroad earnings and the fact that new conditions had caused drastic changes in transportation conditions and drastic reductions in railroad earnings is recognized in a report of the Committee on Interstate and Foreign Commerce of the House of Representatives, 74th Congress, First Session, Report No. 1560 recommending passage of H. R. 3263, a copy of which is attached to this brief as Appendix "C".

From the fact that the actual earnings for the three years preceding the assessment averaged only $11,950,826.00, and the fact that there was no prospect of increasing these in the future above $14,000,000, it follows that a valuation based upon average earnings of $25,507,192.00 (the average for the five years preceding the 1932 assessment) clearly resulted in an assessment which was levied against values which may have existed in the pre-depression boom years, but which had permanently disappeared and which no longer existed in the year 1933.

That a failure to give adequate recognition to changed economic conditions is not within the permissible discretion of an administrative tribunal and that the court will take judicial notice of the present depression, is the effect of the decision in *A. T. & S. F. Ry. Co. v. United States*, 284 U. S. 248, 52 S. Ct. 146. At page 260 this court said:

> "There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation'. The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression', and stated that 'the chief cause of these reductions has been loss of traffic'. For 'in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions'."

Referring to suggestions regarding the wide discretion of the Commission, the court said on pages 261 and 262:

> "These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions."

The following language on page 262 seems equally applicable to a tax board:

> "We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to

enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements."

Following this the court held that failure to recognize changed economic conditions "was not within the permitted range of the Commission's discretion."

It would seem to follow that an assessment for 1933 which can only be justified by ignoring depression conditions and going back to the boom years of 1927 to 1929 is not within the permitted discretion of a Tax Board.

In the case of *In re Assessment of Kansas City Southern Ry. Co.*, 168 Okla. 495, 33 P. (2d) 772, the court held that an assessment for 1933 based upon earnings and stock and bond prices for the five years immediately preceding the assessment were so arbitrary that it must be cancelled, upon the ground that the five year period included boom year earnings of an obsolete economic era which no longer afforded a logical measure of probable future earnings. The court said (p. 786, Pac. Rep.):

"The court takes judicial knowledge that there has been an era of depression, nation and world wide. This has had its destructive influences on railroad property as well as other property.

* * * * * *

"We do not think it tenable that those two years, 1928 and 1929, should be used in reflecting an assessed valuation of the railway property in 1933.

* * * * * * *

"We have been passing through an entirely different economic and industrial era since the years 1928 and 1929. Panicky conditions have prevailed. The organic condi-

tion of the railroad, its ties, rails, equipment, etc., are perhaps substantially the same, usual wear and tear excepted, but the figures conclusively prove that there has been a loss of earning power occasioned by other competing transport agencies, bus lines, truck lines, and air lines. The railway company asserts with confidence that this loss of business will not return to the railway company.

In the light of these facts, we are of the opinion that the taxable value of the railway company as of February 1, 1933, cannot be determined by measuring the peak of prosperity in the years 1928 and 1929 with the income derived during the commercial disaster of the business, in the years 1930, 1931 and 1932, and that the years 1930, 1931 and 1932 constitute a measurably substantial period of time for the purpose of sufficiently reflecting the proper assessable value of the property in question fixed as of February 1, 1933."

Our case is stronger than the Kansas City Southern case because there the Board had actually attempted to exercise its functions in 1933 and had based its computation upon the five preceding years including 1932 while here the assessment can only be computed by eliminating 1932 entirely and going back as far as six years before the assessment.

It is clearly established therefore, not only by the facts and by sound common sense reasoning but also by the decisions, that a large part of the very apparent excess in the assessment now at issue was levied against values of an obsolete period and against values which no longer existed in 1933.

We next proceed to show that another large part of the assessment was levied against property actually located outside the state.

Of the total amount of the assessment, approximately $20,000,000 was levied against properties outside the state and beyond its jurisdiction.

1. *The North Dakota trackage consists largely of relatively cheap branch lines. The more valuable terminals and more costly mountain construction are located outside the state.*

By far the largest terminals on the Great Northern Railway are at the eastern and western ends of the system, in the Twin Cities and on Lake Superior in the east and on Puget Sound in the west. The estimated cost of reproduction less depreciation of these three terminals alone was $68,804,121 (Ex. 4, R. 75, 76, 230). The total figure for the entire system in the United States is $532,538,184 (Ex. 7, R. 232) so that these three terminals comprise about 13% of the total physical property of the system. On the other hand, these terminals include only 53 miles of road (R. 76) out of a total of 7,591 miles (Ex. 6, R. 231). In other words, 13% of the property is included in less than 1/10 of 1% of the mileage at the extreme eastern and western ends. The cost per mile of road in the terminals is about $1,300,000 as compared with $40,779.00 for North Dakota (Ex. 7, R. 232). Another way of stating it is that one mile in these terminals contains as much physical plant as 32 average miles in North Dakota.

The total cost of reproduction less depreciation of the property in North Dakota is $78,190,762 and the mileage is 1917.41 (Ex. 7, R. 232). In other words, the 53 miles in these three terminals contain almost as much physical plant as 1917 miles in North Dakota.

In *Fargo v. Hart*, 193 U. S. 490, 24 S. Ct. 498, the court in attempting to state a very extreme hypothetical case said:

> "But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile."

Here we have a specific case falling almost exactly within this statement.

In addition to these three large terminals, there are other smaller terminals located both in and out of North Dakota as listed on Exhibit 5 (R. 230). But the larger of these smaller terminals are located outside of North Dakota, and there are more of them in proportion to mileage outside the state than inside (R. 76).

Disregarding the terminals and considering only the road itself, the miles in North Dakota are not equal to those on the balance of the system. In North Dakota there are 735 miles of main line and 1183 miles of branches. 61.7% of the total consists of branches, and the branh mileage is 161% of the main track mileage, while on the balance of the system only 43.5% is branch line mileage (Ex. 6, R. 231, 74, 75). On these branches the traffic is light and it is not necessary to provide so much construction for reducing grades and curves (R. 75).

North Dakota is a relatively level prairie state of simple railroad construction and without large terminals or shops (Complaint paragraph XII, R. 9; Answer, Part II, paragraph I, R. 28). The average mile in North Dakota contains very much less of all the units of construction making up the railroad than an average mile outside. It has only 80.5% as much steel rail per mile, 59.5% as much grading, less than 56% as much bridging, 63.9% as much signal apparatus and no snowsheds (Ex. 3, R. 229, 75). There are fewer stations and fewer division terminals in proportion to miles of road in North Dakota than there are on the balance of the system (R. 75).

As a result of all of these conditions, the average mile outside North Dakota contains $80,076 worth of construction and physical property as compared with $40,779 in North Dakota, or nearly twice the amount (Ex. 7, R. 232, 77). In other words an average mile of property outside the state is the same in length but greater in depth and breadth, size of rail, number of sidetracks and accessorial structures.

If we had built the entire 7500 miles of line with the same amount of grading, rail, etc., which was used in North Dakota and at the same cost of $40,000 per mile, the total system cost would have been approximately $300,000,000 instead of $564,000,000 (Ex. 7, R. 232). A mileage prorate to North Dakota might then be fair. But in addition to this, we have added an additional $264,000,000 of plant to the property lying entirely outside the state of North Dakota. It is when the mileage prorate is applied to this additional $264,000,000 that our protest arises.

Not only does the average mile in North Dakota contain less physical property, but it also originates less traffic, and carries, less traffic than the average mile outside, and is, therefore, less valuable from the standpoint of earnings. Exhibit 13 (R. 241) shows that North Dakota originates from 645 to 1204 tons per mile in different years as compared with from 990 to 3689 tons for the outside miles (R. 104, 105). Exhibit 14 (R. 241) shows that North Dakota trackage carries from 474,000 to 827,000 tons per mile as compared with from 528,000 to 1,111,000 tons outside (R. 105).

The physical situation is well summarized by this court in *Wallace v. Hines*, 253 U. S. 66, at 69, 40 S. Ct. 435, where the court said:

> "As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total

value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

2. *The outside terminals and costly mountain construction, while concentrated in short mileage contribute as much to transportation service and to system value in proportion to cost and volume of plant as do the cheaper portions of the road where the same investment is spread over more miles.*

It is obvious that a railroad could not exist and function without terminals. It is in the terminals that separate cars are combined into large trains so that freight can be moved over the road in large volume, and it is through the destination terminals that the large trains are broken up and delivery effected. Without terminals, cars would have to be moved as they might come upon the road in trains of from one to half a dozen cars and at greatly increased cost and at much higher rates. It is perfectly apparent that the terminals play as large a part in effecting the transportation between consignor and consignee as do the transcontinental tracks.

The same thing is true of mountain tunnels. By piercing a mountain with a single mile of tunnel costing a million dollars, we may avoid building a hundred miles of roundabout line at an even greater cost. The single mile of tunnel may contribute as much to the efficiency of transportation as a hundred miles of roundabout trackage. Transportation involves not only the overcoming of space resistance but also all other natural obstacles such as rivers and mountains. Plant which is required to bridge rivers, pierce mountains or elevate traffic over a mountain range contributes as much to the final result as does the trackage which is laid across a level prairie and which overcomes nothing but space.

It follows that a million dollars invested in a single mile of terminals or in a single mile of bridge or tunnel is as much entitled to a return upon every dollar of the investment, as is a million dollars which is spread out over 100 miles of prairie line. If this were not so, no investor could be found who would provide the funds for construction of the more costly parts of the line. The fact that a million dollars worth of investment is spread over more miles in one state than in another is no indication that it contributes more to the total transportation result or that it is entitled to a larger share of the system value.

About 1/3 of all operating costs are incurred in terminals (R. 117). As measured by cost, therefore, about 1/3 of the total transportation effort is expended in the terminals and 1/3 of the total transportation service is performed there. This would indicate that the use value of the terminals, based on the actual service they perform is a very substantial part of the total use value or commercial value of the system.

It is true that the system may not earn an adequate return upon its entire cost and its commercial value may be far below

its reproduction cost. The commercial value of the Great Northern system today amounts to hardly more than one-third of its reproduction cost. But however small the return may be, the money which is invested in tunnels and terminals is entitled to share in that return dollar for dollar with the money which may be spread out over more miles of cheap line in North Dakota.

It is also obvious that whatever value the terminals and costly mountain construction may have is included in the total system value of the property, when that system value is computed upon the basis of earnings or stock and bond prices. The stock and bond prices depend upon the earnings and the earnings are the joint product of all portions of the line and all of the service. They are the result of the terminal and mountain operations as much as they are of the ordinary line trackage. Therefore, when we apportion system value between states, whatever the basis of apportionment may be, we are apportioning a value which includes the value of the terminals as well as that of the miles of road, and we must see to it that the method of apportionment credits back the terminal portion of the system value to the state where they belong and that it does not spread them over intermediate states. These propositions are axiomatic but they are lost sight of in the arguments which are advanced in favor of the mileage prorates of system value and it is, therefore, important that we have them in mind before discussing the effects of the mileage prorates.

With these elementary principles in mind, we proceed to consider the question as to where these terminal values can lawfully be assessed.

3. *The right to assess and tax each portion of a railway system belongs solely to the state where that portion is located.*

This proposition presents an issue which has been in bitter dispute between the prairie states and the terminal states for many years. The terminal states contend for the right to assess and tax the value of the terminals located within their borders while the intermediate prairie states contend that the terminal values should be spread equally over the line and that they should share in the assessment.

The argument for spreading the terminal values is that the road is a unit; that the terminals are provided to serve miles of road in the prairie states as much as to serve the miles in the terminal states; and that it is the intermediate road miles which give the terminals their value and that without the intermediate road miles, the terminals would have no value.

It is equally true that the intermediate road miles would have no value without the terminals and that it is, therefore, the terminals which give the road miles their value. It would be equally sound to conclude that some portion of the road mile values should be taken away from the prairie states and credited to the terminal states.

The fact is, of course, that either portion without the other would have nothing but scrap value. It is the combining of the two that raises the value of each from a scrap value to a cost or use value. In this sense, it is true that it is the road miles which create the use value in the terminals, but it is also true that it is the terminals which create the use value in the road miles. We might go farther and say that every single mile of road creates the use value in all of the other miles, for if a single mile of road were permanently removed, the rest of the road would be useless.

But when the road miles in the prairie states are credited with the full use value which results from their combination with the terminals, the prairie states have been fully credited

with all of the value that they are entitled to as a result of their connection with the terminals. We cannot go further and credit them in addition with some portion of the use value of the terminals, any more than we can credit the terminals, in addition to their own full use value, with some portion of the use value of the road miles. It would be equally sensible to argue that each mile of road, in addition to its own full use value, should be credited with some portion of the use value of all the other miles, because without it the other miles would be useless. To credit one portion of the railroad with a part of the use value of another portion would be to leave the latter portion without its full use value, and this would be contrary to the fundamental principles expressed above.

Taxes are levied against property to pay for the exercise of the functions of government in the state where the property is located. The state where terminals are located provides the police and fire protection for the terminal property. It also provides for highway access, education of the children of terminal employes and of all other governmental functions. The intermediate states provide none of these things and incur no governmental expenses because of the terminal property. It is a universal rule that property should be taxed where located, and there is not the slightest reason for any exception in the case of railroad terminal property.

However, an abstract discussion of the underlying principles seems unnecessary, because it is so firmly established by the decisions of this court that terminal values can be assessed only in the states where the terminals are located and that they cannot be assessed in part by the intermediate states.

In *Fargo v. Hart*, 193 U. S. 490, 24 S. Ct. 498, this court said:

> "It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege,

or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

In *Wallace v. Hines*, 253 U. S. 66 at 69, 40 S. Ct. 435, the court said:

"As the law is administered, the tax Commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The state is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other states. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

In the recent case of *Rowley v. C. & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55, the court said:

"Where, as in this case, the evidence requires a finding that the railroad in one of the states reached by the system is clearly shown to be worth much less than the aver-

age value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that state, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary."

See also *Pittsburgh, C. C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114; *Union Tank Line Co. v. Wright*, 249 U. S. 275, 39 S. Ct. 276; *Southern Ry. Co. v. Kentucky*, 274 U. S. 76, 47 S. Ct. 542.

In these cases, the apportionment had been attempted upon the basis of miles of road only and not upon a combination of several factors, but they establish the proposition very definitely that the power of assessing and taxing terminals belongs exclusively to the states where the terminals are located and that the terminal values cannot be spread for purposes of assessment over the intermediate states, and that any method of apportioning system value which accomplishes that result is necessarily unlawful.

In the case now at bar the attempted apportionment was based upon a composite of five different factors, and it remains to consider only whether the unlawful spreading of terminal and other out-state values is avoided by the composite factors used by the State of North Dakota.

4. *The factors used in the North Dakota computations unlawfully credit to North Dakota values of terminals and mountain construction actually located in other states.*

We have already quoted paragraph G of the Answer in which the state admits that the computations upon which the 1932 assessment was based were made by apportioning the value of the entire railroad system to North Dakota by certain allocation factors. The five factors as enumerated in paragraph IX of the Complaint upon which the first computation

is based were as shown in the following list which also shows the ratio of each for North Dakota for 1932 as taken from Exhibit N.

1.	Miles of all track	20.19%
2.	Physical property	13.84%
3.	Car and locomotive miles	19.90%
4.	Ton and passenger miles	18.65%
5.	Gross earnings	18.45%

Paragraph G of the Answer states that one computation was made by the use of all five of these factors, another by the use of factors 3, 4 and 5 and still a third by the use of factors 1, 3, 4 and 5.

The number of cars moved one mile and engines moved one mile in and out of North Dakota is computed by measuring the mileage moved between the stations of origin and destination and does not include any movement in switching service in the terminals. Similarly the number of tons moved one mile and passengers moved one mile includes only the movement between the stations of origin and destination and does not include any switching movements (R. 78, 115).

In other words, these factors are dependent entirely upon miles of road over which the shipment moves and they are not affected in any way by the location of terminals. A state containing terminals is not for that reason credited with any more of these miles of movement over the road, and a state without terminals is not for that reason credited with any less.

The gross revenues credited to North Dakota include all earnings wholly within the state and a portion of through earnings on shipments moving in any part within the state, equal to the proportion which the miles of movement on that shipment in North Dakota bear to the total miles of movement of that

particular shipment. Here again the apportionment is made upon the basis of miles of road over which the shipment moves and is in no wise affected by the fact that there may be terminals in one of the states and no terminals in another (R. 115). 92% of all of the gross revenues credited to North Dakota consist of a mileage prorate of through revenue, as the traffic in and through that state is almost wholly interstate (Complaint Par. VIII, Answer Par. E).

The gross revenue ratio on each shipment is therefore necessarily identical with the ton mile, road mile or track mile ratio on that particular shipment. The combined ton mile and passenger mile ratio for North Dakota for the five years ending in 1932 was 18.65% while the gross revenue factor is 18.45%. The two would, of course, be identical if rates were the same in and out of the state, and the gross revenue factor for North Dakota is slightly less only because the average revenue per ton mile and passenger mile on business which moves partly in North Dakota is slightly less than the average on traffic which does not touch North Dakota.

It is apparent, therefore, that the proportion of car and engine miles, ton and passenger miles and gross revenue in any state depends entirely on the miles of road in and out of that state over which the traffic moves, and that it does not depend at all on the location of terminals. As between two states of equal road mileage and equal traffic density these factors would apportion the system value 50-50. The fact that there might be valuable terminals in one state and none in the other would not affect any one of these ratios. If the terminals were originally in state A, the ratio would be 50-50, and if they were later removed out of state A and into state B, the ratio would still remain 50-50, and the system value including terminal values would still be apportioned equally. In other

words, these factors spread the entire system value, including whatever terminal values it may contain, equally over all miles of haul, and regardless of the location of terminals in one state or the other.

This would appear still more plainly if the line of road were all located in state A, with the shops and terminals located just across the boundary in state B. Here 100% of the car and engine miles, ton and passenger miles and gross revenue (the miles of haul factors) would be credited to state A and nothing to state B. If these three factors were used alone, the entire system value, including whatever value the terminals and shops in state B might have, would be assessed and taxed in state A, and state B, which actually contained the terminal and shop properties, would have nothing to tax.

We can again vary the case by moving the state boundary a little further from the terminals and leaving 10% of the road mileage in state B. This state would now be credited with 10% of the system value including only 10% of the terminals which are located 100% within her borders. Again, if the state boundary were at the center of the line, state B would then be permitted to tax 50% of her own terminals and state A would be credited with the other 50%. In other words, the right to tax the terminal values would depend not upon the location of the terminals but upon the location of the road miles. The state with the terminals would get no more than its road haul proportion of the system value and the state without terminals would get no less, and we could transfer the terminals from one state to the other without affecting the apportionment of value.

The theory underlying the use of the "miles of haul" factors seems to be that, while the track mile factor reflects nothing but the proportion of trackage in a state, the three miles of

haul factors reflect varying amounts of traffic density and, therefore, tend to correct the errors in the miles of track factors when used alone.

It is true that these three "miles of haul" factors reflect differences in traffic density as well as miles of road haul, and if one of the states had twice as much traffic density as the other, on the same road mileage, its miles of haul ratio would be twice as great. In other words, these ratios are not necessarily the same as the ratio of miles of road, since they are affected by varying traffic. But it would still be true that an apportionment made on these three factors would be without regard to the actual location of the terminals. With equal road mileage in two states, the density might be twice as great in the state without terminals, in which case 2/3 of the system value including 2/3 of the terminal value would be allocated to that state. If the terminal state were the one with double the density, it would thereby be credited with 2/3 of the system value. But this would be in recognition of the greater traffic density and greater earning power of its miles of road, and not in recognition of the location of its terminals. And whatever the difference in traffic density might be, the terminals could still be transferred from one state to the other without affecting the apportionment of value between them in the slightest. The point that we are making is that by this method of allocation, the state containing the terminals is not credited with their entire value but that on the contrary the terminal values are spread equally over all states either in proportion to track miles or miles of haul.

Because of its lighter traffic density, North Dakota's three "miles of haul" ratios are slightly less than its track mile ratio and, therefore, the composite five factor ratio credits North Dakota with slightly less of the terminal values than

would the track mile ratio if used alone. But this slight reduction gives no sufficient recognition to the smaller property value and density of the North Dakota road miles as compared with the larger property value and density of the miles of road outside, and it does not even tend to restore any terminal values whatever to the states where they belong.

It is true that the track mile factor is based upon miles of all track including side and yard track, instead of upon miles of road or miles of main line only. This factor includes all of the yard tracks in the terminals and so gives some slight extra credit to the terminal states. But it also counts every mile of cheap branch line in North Dakota and treats each as being equal to a mile of main line or to a million dollar mile in the Cascade Tunnel, across the Columbia river bridge, or in the large city terminals. The Great Northern line in North Dakota is a veritable gridiron of these cheaply built branch lines as shown on the map (Ex. 1, R. 227). The proportion of branch lines to main lines is 161% in North Dakota and only 76% on the balance of the system (Ex. 6. R, 231). The proportion is more than twice as great in North Dakota. As a result of treating each of these cheap branch lines as being equal to any other mile on the system, the "miles of track" factor, while it gives some slight credit to the terminal states for the yard tracks, gives even more credit to North Dakota for its cheap branches and the net effect is that the miles of track ratio for North Dakota is the highest of the five factors used. It was 20.19% in 1932 as compared with the five factor average of 18.20%. The total miles of all track in the three large terminals, including all yard tracks, is only 537 miles, of which 53 miles are main line, leaving 484 miles of side track (R. 76, 86). Any credit to the terminal states for these, is more than offset by the fact that there are 1,183 miles of

branch lines in North Dakota which are given undue credit by the track mile ratio (Ex. 6, R. 231). It follows that this factor, instead of restoring terminal values to the terminal states, abstracts still more of them because of the large branch line mileage in North Dakota.

And even if the North Dakota branch lines did not afford this offset, the crediting of only 484 miles of yard tracks to the terminals (we ignore whatever offset there may be on account of yard and side tracks in North Dakota) is only about 6% of the 7591 miles of road on the system (Ex. 6, R. 231). And when this track mile factor is averaged with several others which give no credit for yard tracks in terminals, this 6% is thereby diluted and reduced to 1 or 2%. As 13% of the total plant is in the three terminals, and as 1/3 of the total operating expense is incurred in terminals, this small credit of 1 or 2% to the terminal states is totally inadequate.

It appears therefore that 4 of the 5 factors used by the state, viz., track miles, car and engine miles, ton and passenger miles, and gross revenue, all tend to spread the terminal values and credit them unduly to North Dakota. The fifth of the five factors used by the state is the physical property ratio, and as this is based on reproduction cost less depreciation, it alone gives full credit to the terminal states for their terminal properties. However, this is only one of the five factors used and has only 1/5 weight in the result. And the entire five factors were used in only one of the three computations in 1932, referred to in paragraph G of the Answer. In the other two computations, the physical property ratio was omitted. Five factors were used in one computation, four in the second and three in the third. In other words, the three road mile factors were each used three times, the track mile factor was used twice and the physical property factor was

used only once, making a total of 12 factors. It follows that in the final result the physical property ratio was given 1/12 weight and the mileage ratios were given 11/12 weight. The effect of using the physical property ratio in this way is, therefore, that instead of spreading the entire terminal values equally over miles of road or miles of haul, only 11/12 of the terminal values are so spread and 1/12 is credited to the state where the terminals are located.

Combining the physical property ratio of 13.84% with the other four raises the composite average to 18.20%. When the five factor apportionment is combined with that based upon four factors and three factors as described in paragraph G of the answer, the composite ratio is increased to 18.76% or 5% above the physical property ratio. And this 5%, applied to the 1932 system value of $415,278,961.00 as computed by the state (Ex. P. R. 277) (which is based largely upon boom period figures) credited North Dakota with more than $20,000,000 of outside values in the 1932 assessment which was adopted for 1933. In spite of the fact that the physical property ratio if used alone would give full credit to the terminal states, the fact remains that when it is combined with the other factors, and given a weight of only 1/12, its effect is so far lost that, even with this factor included, more than $20,000,000 of outside values are still credited to the state of North Dakota.

Our conclusion that the factors used by the state necessarily spread terminal values over intermediate states might be put into syllogistic form as follows:

(1) The terminals and mountain construction located outside North Dakota have an actual use value which is a part of and included in the system earnings and stock and bond value.

(2) The entire system value, including the terminal values is apportioned among the states.

(3) Not more than 1/12 of these terminal values is apportioned to the states where the terminals are located.

(4) It follows that 11/12 of the terminal values are necessarily spread over all states, regardless of location.

The defendants contend that the use of these mileage factors has been approved by this court in *Rowley v. C. & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55, and in other cases. It would be more accurate to say that assessments based upon mileage prorates have been before this court in cases where they were not condemned. It is not correct to say that they were approved because, while they were before the court, they were not in issue. There was no evidence in the Rowley case and no contention by the railroad that the apportionment based upon miles of haul did in fact credit any terminal values to Wyoming. That contention was made solely with reference to the miles of track factor. It was not pointed out to this court nor even claimed in that case that the miles of haul factors in themselves credited any terminal values to Wyoming, and indeed this may not have been the fact in that case. On the contrary, the sole contention was that the miles of track factor was the only one which wrongfully credited terminal values to Wyoming, and it seems to have been assumed by all parties that the miles of haul factors were sound in this respect. This court simply held that where the single miles of track factor, which would have been unlawful if used alone, was averaged with several other factors which were apparently conceded to be correct, the combination of the single wrongful factor with several other proper ones did not in itself defeat the assessment. In our case, however, it is an established and mathe-

matically demonstrable fact that four of the five factors necessarily credited North Dakota with terminal values, and that these four wrongful factors were used eleven times in the aggregate in determining the 1932 assessment, while the single lawful factor was used only once, and, therefore, given a weight of only 1/12 in the final result. It is demonstrated that the use of the four wrongful factors raised the composite average by 5% and credited North Dakota with more than $20,000,000 of outside values.

If by any stretch of interpretation the Rowley case can be regarded as affirmatively approving the use of mileage factors in the case of a railroad like the Great Northern and in the case of a state like North Dakota, and where the record contains a clear demonstration that these factors spread terminal values over the intermediate states, the decision should clearly be qualified or limited in its operation. If such a decision had been made upon such a record as this, it should clearly be reversed. We submit that this conclusion is undebatable.

5. *Some additional reasoning to the same effect.*

We believe that the foregoing arguments conclusively establish the proposition that the state's apportionment factors actually and unlawfully credit terminal values to North Dakota and that this proposition does not require any further support. However, there is a great deal of further support in the record, and we hesitate to leave this question without referring to it. If the court feels already convinced by the foregoing argument that terminal values have in fact been credited to North Dakota, the next six pages may be skipped. If any doubt upon this question still remains, we believe that the following arguments will settle it.

One way to consider the track mile and miles of haul ratios, is to consider the track mile ratio as an attempt at measuring the relative amount of property in North Dakota by miles of track, and the miles of haul ratio as being an attempt to measure the proportion of the total service or business of the company which is carried on in North Dakota by miles of haul. A mile of track is used as a measuring stick to measure the amount of physical plant inside and outside the state, and a mile of haul (whether of tons, passengers, cars or engines) is used as a measuring stick to measure the service performed inside and outside the state. But in using a mile of track as a measure of plant volume or property volume, we are using a measure that contains only half as much volume when used inside the state as when used outside the state. It indicates that there are 20% as many of these measures inside the state as there are on the system, but as the measures used inside the state are only half-size, the ratio is entirely misleading.

A similar result takes place when we use miles of haul to measure relative service, because this measuring stick measures nothing but road haul service and entirely fails to measure terminal service, amount of equipment repairs, amount of plant provided, etc.

We must remember that railroad service includes at least four elements: (1) providing the plant and equipment, (2) keeping it in repair, (3) performing the terminal service, and (4) moving the traffic over the rails. The three North Dakota factors showing miles of road movement reflect only the fourth element out of the total service, i. e., the road haul. But for every mile of movement *outside the state,* the company has to provide twice as much fixed plant on the average, and also to repair and maintain twice as much plant, as well

as performing a heavy terminal service. In this respect an average mile of movement outside the state represents more total service than an inside mile, and while the three "miles of haul" factors indicate that about 18% of the miles of haul are in North Dakota, this is no indication whatever that 18% of the total business is done there or 18% of the total money earned there, since the balance of the system, in addition to providing the other 72% of the miles of haul, also provides nearly all of the terminal and repair service and a proportionately larger part of the total plant.

An average car mile in switching service in the large terminals, which are located in other states, requires about 15 times as much effort and costs about 15 times as much in operating expenses as the average car mile on the road (R. 114-117). In using a car mile ratio, ten or fifteen cents worth of transportation service in North Dakota is assumed to be an equivalent unit with $3.00 worth of transportation service in the Minnesota and Washington terminals, simply because both are spread over a mile of ground (R. 114).

We have pointed out above that if the entire road mileage were located in one state, with the terminals, shops and general office buildings just across the boundary in another, the miles of haul ratios would allocate to the first state 100% of the entire property including the property located in the second state. We have an actual situation on the Great Northern Railway which is very close to this. Our line which carries iron ore from the Minnesota iron ranges to the Lake Superior docks is located 90 miles in Minnesota and ten miles in Wisconsin. However, the 10 miles in Wisconsin contain the yards, terminals, repair shops and docks, and the actual reproduction cost is about $16,000,000 in each state. So far as actual value of plant is concerned, the two states are equal. But

Minnesota has 90% of the total miles and of the miles of haul, and the five factor ratio including the physical property factor would be about 80%. With an aggregate value of $32,000,000, Minnesota, under the five factor formula, would assess her $16,000,000 plant at 80% of the total, or $25,600,000 and Wisconsin would assess her $16,000,000 plant at $6,400,000 (R. 96, 114, 139).

The situation as to the movement of North Dakota wheat to the Twin City and Lake Superior terminals is the same in principle and differs in fact only in that the state boundary is nearer to the center of the haul instead of close to the terminals (R. 140). In this situation, North Dakota and Minnesota each have 50% of the miles of haul and therefore, North Dakota instead of being credited with 90% of the terminal values is credited with only 50%. But in both cases, the terminal values are spread equally over the miles of haul without regard to the location of the terminals. These illustrations show the absurdity of apportioning system value according to track miles, or miles of haul, because thereby terminal values are abstracted from the state where they are located and credited to the states where the road haul is performed.

We also pointed out above that one mile of tunnel in one state might avoid the necessity for 100 roundabout miles of track, and that on every shipment, the car miles, ton miles, engine miles, etc., which would amount to 100 miles of haul if performed on a roundabout track, might be reduced to one if handled through a tunnel, merely because of the fact that the company had put its investment into a tunnel instead of into a roundabout track. Here again we have an actual illustration of this on the Great Northern. The towns of Skykomish and Leavenworth, Wash., separated by a mountain barrier, could have been connected by 150 miles of 1% grade over

the summit or by 50 miles of line using tunnels (R. 77). The company chose the latter alternative at great cost, and by the erection of a costly and valuable plant, thereby reducing from 150 to 50, the number of track miles, car and engine miles, ton and passenger miles and the mileage prorate of gross revenue between these two points in Washington. Because a more costly, more efficient and more valuable plant was built between Skykomish and Leavenworth, the amount of through revenue and the amount of system value allocated to this segment of line under the North Dakota formula are reduced to one-third. The better and more concentrated the railroad plant becomes the less it is worth. On the other hand, the value which is thus taken away from the improved part of the line is spread over the unimproved portions. The effect is to give to North Dakota and other states a correspondingly larger percentage of the total system track miles, operating miles and service miles and, therefore, of the system value.

Presumably the heavier tunnel investment reduced operating expenses and thus increased system net earnings and stock and bond values, so that under the North Dakota method, North Dakota and every other state would claim a higher percentage of a higher system value, and, therefore, several million dollars more value in North Dakota because of the creation of valuable property in Washington (R. 77, 117-118). Because Washington contained a more costly plant, North Dakota would be given a higher value and Washington a lower value than would be the case if we had constructed a cheaper plant in Washington or had chosen the alternative of constructing more miles of less usefulness and less value in Washington.

And after the original tunnel line had been completed between Skykomish and Leavenworth, Wash., the company built a still longer tunnel at a lower grade and made other line re-

visions at a cost of $26,000,000 which effected a further shortening of 18 miles of distance and presumably reduced operating expenses and increased the system value accordingly (R. 77). The effect of this improvement in Washington was to still further reduce the percent of all mileage factors in Washington and to correspondingly increase them all in North Dakota and other states, thus again giving to North Dakota under the state's formula a yet higher percentage of a still higher system value, and giving Washington a smaller percentage, not because of any improvement in North Dakota but because of the creation of additional plant in Washington. An assessment by North Dakota on this basis is clearly an assessment upon property in Washington and is clearly condemned in *Fargo v. Hart* and similar cases.

The objections which we have been making to the use of these miles of haul ratios are objections that would apply to any intermediate state. There are other weaknesses in the use of these ratios which apply particularly to North Dakota. For example, an average carloading in North Dakota is around 16 tons while the average carloading on the balance of the system is nearly 30 tons (R. 116, 130, 135). This is due to the large amount of less than carload tonnage moving in lightly loaded cars on North Dakota branch lines (R. 135).

While a locomotive on the iron ore carrying lines of the Great Northern in Minnesota hauls 170 cars or twelve or thirteen thousand tons per locomotive mile, a locomotive on the branch lines in North Dakota would haul about two to four hundred tons on the average. These particular engine miles in North Dakota have an actual value in volume of traffic handled equal to only 1/70 of those on the Minnesota ore lines (R. 116). The state's tax expert conceded that car and engine miles moving smaller tonnage should not be given as

much credit as car and engine miles with heavier tonnage (R. 201).

Exhibit 12, Schedule B, Line 7 (R. 239) shows that the movement of a thousand tons of freight one mile in North Dakota requires $7.19 worth of effort while the average movement of a thousand tons on the balance of the system requires $9.89 worth of effort. The ratio is nearly 10 to 7. This is, of course, because of the terminal and shop expenses in the other states. As the average carload in North Dakota is 16 tons and the average carload on the rest of the system is 30 tons, it is easy to compute that the movement of an average car one mile in North Dakota requires 11½¢ worth of effort while the movement of an average car one mile on the balance of the system requires 29.68¢ worth of effort.

Still another vice of all of the ratios reflecting miles of movement is that they ignore mileage made in switching service in the terminals and consider only the miles made in roadhaul between terminals (R. 78, 115). If there should be five or six miles of switching service after the car reaches a terminal, each of these miles costing as much as 15 roadhaul miles, the effect would be the same as if we excluded 75 to 90 miles of roadhaul service outside the state on each trip while including the entire mileage made in North Dakota.

We have seen that in computing gross revenues earned in North Dakota, interstate revenues are allocated in proportion to miles of road only (R. 87), and that 92% of all the traffic in North Dakota is interstate (R. 70). Approximately one-third of the service in an average through haul (as measured by cost) is performed in the terminals and two-thirds on the road (R. 117). The miles made in terminals are given no weight whatever in computing the gross revenue ratio, although they should be entitled to about fifteen times as much weight

as road miles (R. 79, 115). It follows that a prorate of interstate revenue in proportion to miles of road is virtually a repetition of the track mile ratio and accords an excess of credit to a state like North Dakota.

This concludes our argument upon this point. We submit that the spreading of terminal values over North Dakota is demonstrated:

(1) By the fact that the terminal values are included in the system value which is apportioned among the states and that since they are not credited to the terminal states, they must be spread over all states.

(2) By the fact that a track mile is a measuring stick of smaller volume when used in North Dakota than when used outside, and that miles of haul do not measure any part of the total railroad service except the haul over the road, and entirely fail to measure that part of the service consisting of the providing of the plant, the maintenance of plant and repair of equipment and the terminal service. As these are performed more largely outside the state, the three "miles of haul" factors necessarily spread them over all states in proportion to miles of road haul only, and thus give undue credit to North Dakota.

D.

Where the use of unlawful methods by the taxing officers has been shown, it is not incumbent upon the taxpayer to submit a proper method of computation or to prove the correct amount that is due.

In *Guy T. Helvering, Commissioner of Internal Revenue v. Walter W. Taylor,* No. 289, 293 U. S. 507, 55 S. Ct. 287, decided January 7, 1935, the court said:

> "We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that

> the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount. While decisions of the lower courts may not be harmonious, our attention has not been called to any that persuasively supports the rule for which the Commissioner here contends.
>
> * * * * * *
>
> But, where as in this case the taxpayer's evidence shows the Commissioner's determination to be arbitrary and excessive it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe. unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him."

Under this decision, it is not incumbent upon us to tell the state how to make its assessment. The state must itself find some method of valuing the property in North Dakota which will avoid crediting North Dakota with values outside the state. This might be accomplished by entirely avoiding the computation of a system value and by capitalizing the net earnings earned by the property in North Dakota alone. Or it might be accomplished by first computing a system value and then allocating proportionate part of that system value to the terminals and mountain construction outside the state, and deducting it from the system value before prorating the balance to North Dakota on the five factor formula. An apportionment of system value between the ordinary road mile trackage on the one hand and terminal properties and extraordinary mountain construction on the other might be made in proportion to cost. Any method that the state might see fit to adopt and that would be reasonable and used in good faith would be sufficient.

Or total system value might be apportioned between states in proportion to the physical property factor used alone. This

would appear to be defensible because it would allocate the system value in proportion to the volume in each state of the physical plant which produces the service and value.

It might be said in criticism of this that equal volumes of physical plant in different states might have different commercial values depending on traffic density, and that a million dollars worth of track in one state with a very heavy traffic density might be worth more than a million dollars worth of plant in another state with a very light traffic density. We submit, however, that the commercial or use value of equal investments in different portions of the line does not necessarily vary with traffic density.

It is a well-settled principle of rate-making that rates should be lower in regions of greater traffic density and higher in regions of less traffic density. This is necessarily so if railroads operating in low density areas are to be allowed to earn the same return on investment as railroads operating in high density areas. Relative values depend upon relative earnings and the earnings are a product of *the density times the rate.* A railroad or portion of a railroad with low traffic density should be allowed correspondingly higher rates. These rates should be so adjusted that the return upon every portion of the investment should be no more than is reasonable, and no less, and if single through rates are established for long hauls over different portions of the road with varying costs and varying densities, the through earnings should be credited to each portion in such a way as to yield the same relative rate of return upon each dollar of investment in all portions. If this were not so, investors would refuse to provide funds for the portions of the line where traffic is relatively light and costs high. We must bear in mind, therefore, that the relative value of different portions of the line depends upon earnings

and not upon density alone, because earnings are a product of density and rates.

Of course, there may be branch lines and other portions of a railroad system which cannot pay their operating expenses and which are a liability and not an asset and should, therefore, be credited with nothing but scrap value. However, these are exceptional cases, and we believe that prima facie at least, it would be difficult to attack an apportionment of system value based upon the physical property ratio alone, in spite of variations in traffic density in the different states.

If we were called upon to state what we believed to be the most scientific and accurate method of valuing the portion of a railroad located in any state, our suggestion would be that the net earnings in that state be determined and that the valuation be made either by capitalizing the net earnings or by apportioning the system value in the proportion that the net earnings in the state bore to those of the system.

Of course, before we can determine the net earnings in a state by deducting the expenses incurred in the state from the gross revenues earned there, we must determine what the gross revenues are. And in a state like North Dakota where 92% of the traffic is interstate, this requires an apportionment of through revenues between North Dakota and the balance of the system on some logical basis. We have seen that a road mileage prorate of such revenues is utterly valueless and unlawful because, while 1/3 of the service (as measured by cost) is performed in the terminals and, therefore, presumably something like 1/3 of the revenues are earned there, the mileage prorate spreads the entire revenue over the miles of road haul, and leaves nothing for the terminals. However, we believe that this difficulty can be met by apportioning the revenue from through interstate service in proportion to the cost of producing

the service. Where an interstate haul produces $100 in revenue, a state which incurs 25% of the cost of that haul would be credited with 25% of the revenue. Clearly, this is the basis upon which through revenues would be apportioned if the lines in each state were owned by independent connecting corporations.

Of course, the cost of producing the service should include the cost of providing the plant and repairing the equipment as well as the cost of moving the traffic. To determine the cost of providing the plant, we would determine the rate of return earned by the entire system, whether it were 2% or 10%; and apply that rate to the cost of the plant in each state. This total cost of providing the plant in each state, plus the total cost of operations (including terminal operations and all others) would then be divided by the ton miles moved in that state to determine the total cost per ton mile in each state for plant and operation. In this total cost would be included the cost of providing terminals, tunnels, bridges and other extraordinary structures as well as the cost of operating them, and an apportionment of through revenues in proportion to this cost, plus the revenues earned locally would be a scientific and accurate computation of the gross revenues earned in the state. A deduction of the expenses (which are easily computed) would give the net.

Exhibit 12 (R. 237-239) is a careful computation by this method which is fully described on pages 89 to 95 of the record. By this computation, North Dakota over a five year period produced 12.22% of the net earnings of the system and should, therefore, be credited with 12.22% of the system value instead of the 18.20% indicated by the five factor ratio.

The Circuit Court of Appeals made the curious mistake of assuming that our criticism of the assessment at issue was solely on the ground that the assessment was not computed

upon this net earnings basis, and that this was the only method which any state could lawfully use. The court says "The force of its (appellant's) attack upon that method (the five factor method) is based upon the argument that, in the situation here, the only approximately true method of allocation was one using the comparative 'expense of operation' in North Dakota and outside that state or upon the system". The court held that this method had not been presented to the Board and that it was new and untried, and, therefore, the assessment could not be set aside merely because it did not conform to this method.

Of course, this betrays a complete misunderstanding of our case by the Circuit Court of Appeals. Our attack upon the assessment (aside from the fact that it is levied against obsolete system values which no longer exist, and that $15,000,000 of it lacks any justification whatever) is based upon the fact that the mileage ratios assessed property outside the state. This is demonstrated to a mathematical certainty. Our case is complete there. It is based upon faults in the state's method, and not upon virtues of some other method. We do not have to prove what the proper method would be nor do we contend that the state is obliged to follow the best or most accurate method. Any reasonable method will do, so long as it does not assess outstate property. Exhibit 12 is offered as only one of several possible methods, and only for the purpose of showing that it is possible to make apportionments without violation of law. Failure to conform to the method suggested here is not at all the basis of our attack upon the mileage ratios and, because of this misunderstanding, if for no other reason, we submit that the decision of the Circuit Court of Appeals should be reversed.

We have proven the *fact* that values have been credited to North Dakota which belong in terminals outside the state,

and this has not been disputed in the evidence nor in the opinion by either court nor up to this time, in the briefs of the respondents. See for instance pages 20 and 21 of respondents' brief in opposition to petition for writ of certiorari where the whole question of the spreading of terminal values by the mileage factors is evaded. The entire argument of the respondents as well as the opinion of the Circuit Court of Appeals is based upon a denial that the Board ever used the mileage ratios, and we believe that we have effectively disposed of this question.

E.

Even assuming that no wrongful methods were shown and that there was no evidence whatever as to what methods were used, the facts that the assessment is treble the current value of the property and that the defendants confess their inability to justify it by any rational process are sufficient to prove arbitrary action.

Even if we forget that the 1933 assessment adopted that of 1932, and assume that the figure for 1933 was entirely independent of any previous assessment; even if we assume, as the Circuit Court of Appeals seems to hold, that there is no evidence that prices and earnings of a five year period were used and no evidence that system value was apportioned by the use of mileage prorates; and even if there were nothing in the case but the amount of the assessment of $78,832,888.00, the current earnings and stock and bond prices indicating an actual current commercial value of only twenty-five or thirty million dollars, and the confession of the defendants' expert witness that he could not find any evidence or method that would justify the assessment, and that the value computed by what the defendants claim to be the fairest method was only $63,307,629.00, we submit that on this evidence alone a court of equity should set aside the assessment.

The trial court found that there had been no over-assessment in 1932 or previous years, but refused to find whether or not there was any over-assessment for 1933 (Findings Nos. 8 and 10, R. 52, 53). The court found, however, that there was no evidence (other than the evidence of excessiveness) to show actual fraudulent intent or violation of legislative mandate (Finding No. 9, R. 52), and concluded that mere over-assessment, even though confessed to the extent above indicated, was not sufficient to show arbitrary action nor to warrant relief.

Judge Sanborn's concurring opinion in the Circuit Court of Appeals was as follows:

> "The power of the Federal Courts to enjoin the collection of State taxes upon the property of an interstate carrier has been so circumscribed, as pointed out by Judge Stone in his able opinion, that, although I have no doubt that the property of the appellant in North Dakota was over-valued for tax purposes in 1933, I concur in the conclusion reached in the opinion and the reasons assigned for it. I am not, however, in entire sympathy with the rule which seems to preclude any interference with such overassessments unless it clearly appears that they result from purely arbitrary action or from something akin to fraud. While death from an honest error of judgment may be preferable to death designedly caused, the effect upon the victim is the same. Overtaxation resulting from honest mistake or errors of judgment is as serious as that resulting from fraud, and constitutes just as unreasonable a burden upon interstate commerce. I regard state taxation of interstate carriers as a matter of national concern.
>
> In this case the defendants' own expert states that no method of computation with which he is familiar would produce a value for 1933 equal to that fixed by the State Board. To that extent we have a different situation here than in the Rowley case. That the value of the portion of appellant's system in North Dakota in 1933, after the ap-

pellant had been through three years of depression, even approximated the values of 1928 and 1929 is to my mind inconceivable. Possibly I am substituting my judgment for that of the Board, but the Supreme Court in Atchison, Topeka & Santa Fe Railway Co., et al. v. United States, et al., 284 U. S. 248, referred to a record made in a rate hearing in 1928 as pertaining to a 'different economic era', and said (page 262):

> 'This is not the usual case of possible fluctuating conditions, but of a changed economic level.'.

Certainly no group of men who in 1933 were ready, able and willing to buy the appellant's system and who were clothed in their right minds, would have paid, as the result of fair negotiations, any such sum for the portion of the road in North Dakota as was fixed by the Board. So that, while I agree that the court below, upon this record, was justified in denying the injunction prayed for, I am suffering from no illusions with respect to the great changes which took place in the value of all railway properties between the years 1929 and 1933. It may be impossible now for the Federal Courts to grant any relief to interstate carriers from overtaxation possibly resulting from honest mistakes or errors of judgment on the part of the taxing authorities of those States through which their lines run, but I believe that if interstate commerce by rail continues to be unreasonably overburdened with state taxes, either Congress or the courts will find some way to protect it. In this connection, the opinions of Judge Webster in Northern Pacific Ry. Co. v. Adams County, et al., (D. C. E. D. Wash.), 1 F. Supp. 163, and of Mr. Justice Brandeis in Nashville, Chattanooga & St. Louis Ry. v. Walters, et al., 294 U. S. 405, 55 S. Ct. 486, opinion filed March 4, 1935, are of interest."

We believe that a sounder line of reasoning is found in the language of Judge Webster in *Northern Pacific Ry. Co. v. Adams County*, in 1 Fed. Supp. 163, at pages 170 and 171, where the court said:

"There is no direct evidence in the record showing the methods which were employed by the tax commission in making the offending assessments. No member of the commission took the stand to explain the basis or bases upon which the commission acted in valuing and assessing the properties. No record of the commission shedding light on the method used was produced in evidence. It requires no argument to demonstrate that this attitude on the part of the commission does not foreclose all inquiry into the legality of their determinations. It merely serves to make necessary a different and obviously more difficult method of approach. In order to determine whether their valuations were properly made or are tinctured with constructive fraud arising out of gross excessiveness, it becomes necessary to consider whether, under any legally permissible method or combination of methods recognized by law for ascertaining value, their action can be upheld, as within the proper and legitimate exercise of their powers and discretion. This will be the standard of measurement which I shall apply in reaching my conclusions in this regard.

* * * * * *

Inasmuch as the Legislature of Washington has not defined specifically how railroad property shall be valued for taxation, I am of the opinion that the proper way of testing whether the action of the state tax commission can be upheld is to inquire whether under any legally authorized method or methods its determinations can be justified and sustained."

In the case just quoted from, the amount of over-assessment which was alleged (p. 168) was much less than the excess which we believe we have proven in this case, and yet the court found there that the assessments were "so grossly excessive as to give rise to a presumption of constructive fraud." (P. 185).

Both the trial court and the Circuit Court of Appeals overlooked the fact that this is not a case where the taxpayer has merely shown an actual value lower than the assessment, and where the court can still fairly presume that the Board may have had some different evidence before it, and may have honestly reached its conclusion by some rational though perhaps mistaken mental process. Here the evidence, like that in *Northern Pacific Ry. Co. v. Adams County,* supra, must convince any court that, to paraphrase the language of Judge Webster, "the action of the Board cannot be upheld under any legally permissible method or combination of methods recognized by law for ascertaining value * * * as within the proper and legitimate exercise of their powers and discretion." Where, as Judge Sanborn found, "no group of men who in 1933 were ready, able and willing to buy the appellant's system, and who were clothed in their right minds, would have paid as the result of fair negotiations, any such sum for the portion of the road in North Dakota as was fixed by the Board," we submit Judge Webster was right in his view of the law and that Judge Sanborn was mistaken in believing it to be "impossible now for the Federal Courts to grant any relief." "If interstate commerce continues to be unreasonably burdened with state taxes" as found by Judge Sanborn, we believe that the remedy is available under existing law, that Judge Webster correctly applied that remedy, and that no act of Congress and no change of law by the courts is required for relief in such cases. If the present law does not afford such a remedy, however, we certainly agree with Judge Sanborn that it is high time that some remedy was provided.

The defendants in this case did not rest upon the presumption in favor of the assessment but made a most elaborate attempt to justify it, through the evidence of Lyman Baker, a

tax specialist of Bismarck, North Dakota, and for thirteen years Deputy Tax Commissioner of the state, and now a general consultant (R. 144). Mr. Baker produced a voluminous set of tabulations and exhibits (R. 249-295), finding their culmination in Exhibit P (R. 277). This exhibit showed values for North Dakota computed by five different methods each of which indicated that the assessment for 1933 was from 15 to 25% in excess of actual value. The method used in subdivision 4 of this Exhibit P is the so-called five factor method described above, and is alleged by the state to be "the best and most accurate system of allocating the system value among the states" (Ans. par. I, K, R. 28, 29). This is the defendant's own pleading. By this method the actual value of the property in 1933 is computed at $63,307,629.00 while the assessment was $78,832,888.00. In other words, as a result of adopting the 1932 assessment for 1933, $15,500,000 or 24.52% was arbitrarily added to the actual value of the property as computed by the state itself, and with no foundation or pretense of justification. As quoted above, Mr. Baker also testified that he had been unable to find any method of computation that would produce a value equal to the assessment (R. 190).

The only defense offered against this confessed over-valuation is the naive contention that there had been no over-assessment in previous years, and that under the decisions of this court, the state has the right to make an irrational and highly excessive over-valuation if it is made for one year only and is not repeated. The court is asked to "presume" that the Board had some secret evidence known only to itself which it refused to disclose and which its own expert witness states that he was unable to discover, justifying the assessment and removing it from the domain of arbitrary action.

We grant that where a tract of land is assessed at $1000 and the owner offers proof, no matter how convincing, that it is actually worth only $750, the taxing authorities are not required to come forward and justify the value which they had found, but may rely upon the presumption that they had some evidence before them, that they attempted to act fairly upon it, and that the mistake if any was an error of judgment. But where they do not stand upon the presumption but attempt to justify the assessment by their own witness, who confesses that he has been unable to discover any evidence supporting the assessment or any rational process by which it could be reached, and where it is clearly shown that there is no possible computation by lawful methods which would produce the result, we submit that it must shock the conscience of a court of equity when it is asked to cling to the presumption that there was some evidence or some rational process, when the state's own witness confesses that he cannot find any, and when it is shown to be impossible that the Board could have had any such process or evidence.

It is true that many decisions hold that a mere showing by a taxpayer of over-assessment for a single year will not rebut the presumption. But we know of no instance where this or any other court has clung to the presumption of sufficient evidence in the face of an unsuccessful attempt by the state to justify the amount, and in the face of a confession by the state's own expert witness that he had been unable to discover any such evidence and that he knew of no method of computation by which the assessment could be justified, and that by his own best computation the assessment was $15,500,000 excessive.

We submit that an action is arbitrary if not based upon any evidence or any rational processes. Taking figures from the air or taking a number from a telephone book or a box car

would be arbitrary because it would not constitute even an attempt at a rational process or judgment. Writing down some amount by guess, even though in the best of good faith, if without any reason to believe that it is correct, is equally arbitrary. So is taking an assessment from some other year, after values are known to have changed. And even if the 1933 assessment were determined independently of that for 1932, the mere fact that it was in as large an amount as the 1932 assessment, and that no reduction was made, is in itself evidence of arbitrary action, in the face of defendants' admissions that the same methods of computation would show a shrinkage of $13,000,000 in value (Ans. paragraph L, R. 31, 32). This in itself is some evidence at least that the assessment was not the result of a rational mental process.

In this case the 1933 assessment was not made equal to that of 1932, in ignorance of the shrinkage in value which had occurred, because Exhibit Z-2 (R. 295-303), a statement by petitioner which was before the Board at the time of making its assessment, shows that full information had been given to the Board as to the actual shrinkage in value. For example, on page 297 of the record it appears that the Board had been advised that from 1931 to 1932 "the gross operating revenues of this company decreased 20%. The net railway operating income decreased 90%. The total market value of the Great Northern stocks and bonds decreased 35%." This statement contains full statistics in support of these figures.

It follows that the Board knew or had reason to know that a tremendous shrinkage in value had occurred since the assessment of 1932 was made; that the assessment of 1932 no longer represented 1933 values; and that there was no other evidence and no possible computation by which the 1933 assessment could have been computed as of that date. It follows neces-

sarily that in adopting the 1932 assessment for 1933, or in adopting an equal amount, the Board must have acted either without good faith or without the exercise of any rational mental process. Aside from the fact that the valuation of $63,000,000 computed by Mr. Baker was based upon pre-depression values, which no longer existed, and was based in large part upon values of property located outside the state, the fact that the assessment was $15,000,000 beyond what could be computed even by these unjustifiable methods in itself proves arbitrary action.

The Circuit Court of Appeals states that there was "a decided improvement in stock and bond prices (generally and as to appellant) in 1933 prior to the assessment; and that there had been slight reductions (in assessments) in 1931 and 1932" and "that it is not unusual for the Board to use approximately the same amount for successive years." The court concludes "it may well be, in view of this situation, that the Board might honestly deem its reduction of 1932 (5%) to have sufficiently taken care of the effect on value of the depression covering 1932 and passing into 1933—especially in view of apparent improvement in conditions in 1933."

The improvement in stock and bond prices from 1932 to 1933 upon which the court lays so much stress, is an improvement from $296,301,177 to $305,709,875, an increase of a little over 3% (Ex. 18, R. 243). In view of the fact that the 1927 to 1929 figures upon which the 1932 assessment had largely been based were more than 100% above the 1932 figures, the suggestion that this disastrous shrinkage had been sufficiently met by an assessment reduction of 5%, and that the necessity for any further reduction had been removed by a 3% increase in stock and bond prices, can hardly have been intended seriously, and the fact "that it is not unusual for the Board to use approximately

the same amount for successive years" cannot seriously be presented as a justification for ignoring a $15,000,000 shrinkage in value.

In view of the fact that the commercial value of the property as indicated by current earnings and stock and bond prices was not over $25,000,000; that no men "who were clothed in their right minds" would pay anything like the amount of the assessment for the property; and that the defendants' expert witness testified that he has been able to find no evidence or method of computation by which the assessment can be justified, we submit that this assessment would have to be canceled, even though there were no evidence whatever that boom period prices had been used or that out-state values had been assessed.

F

The economic emergency does not justify the violation of the statute requiring the assessment of property at its full and true value in money.

The defendants claim that an economic emergency existed, that stocks had lost their value, that there was a flight from securities, that farms no longer had any income, that the earnings of all property had practically disappeared, and that the board was, therefore, not obliged to give the usual weight to current earnings and stock and bond prices or to follow the usual formulae in determining values.

Assuming for the sake of the argument that these economic conditions would be sufficient justification for not basing the value of the property on its 1932 earnings of only $1,292,000 (which would give the system a value of about $20,000,000 and North Dakota about three or four million dollars) or even that

they would be sufficient justification for not reducing the assessment as low as $25,000,000 as indicated by current stock and bond prices and three years earnings, still it does not follow that the Board is acting within the zone of reason or permissible discretion in totally ignoring depreciated values or in trebling the actual current value of the property, and in refusing to give any recognition whatever to the shrunken depression values and to the complete disappearance of boom period values. Neither the Board nor the Court should absolutely blind itself to these changed conditions.

The law requiring assessment at the true and full value in money still remained upon the statute books. And no economic emergency will justify an administrative tribunal in setting up its own opinions as to the requirements of the public welfare, above the requirements of law.

In *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398 at 425, 54 S. Ct. 231, this court said:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."

In *Ex parte Milligan*, 4 Wall. 2, at 121, this court said:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, * * *"

In *A. L. A. Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 55 S. Ct. 837 at 842, this court said:

"We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary."

It follows from these decisions that the Board was still obliged to comply with the law, and to assess the property at its actual money value. And even assuming that there was a *potential* value above the current indicated value, based upon the hope of a return to normal times, and that the Board, would, therefore, have been justified in assessing the property at more than its current indicated value, it does not follow that it was justified in shutting its eyes entirely to the fact that even the highest possible potential value based upon the hope of a return at some indefinite time in the future to normal business conditions, must be very much less than the inflated boom period values of 1929. We submit that even in the face of all of the emergencies pointed out by the defendants, it was not the exercise of a rational mental process for the Board to continue an assessment in 1933 which was three times the current value, which could not be justified even by the use of five

years earnings and stock and bond prices, and which was only 1% less than the boom period assessment of 1929.

And even if we are entirely mistaken in this, and even if the Board were fully justified by the emergency in continuing boom period assessments in effect, it would not be justified on that ground in continuing to assess properties located in other states. The "economic emergency" argument does not even pretend to justify the state of North Dakota in assessing terminals located in Minnesota and Washington, which the State had done, not only in 1933, but for many previous years.

CONCLUSION

In conclusion we submit that the use of pre-depression prices and of mileage prorates in making the assessment is not only proven but admitted; that these methods necessarily assess values which have ceased to exist, and properties in other states, and treble the actual current value of the property; that after computing a valuation by such methods, the addition or subtraction of a few dollars before placing the amount on the assessment rolls, does not immunize the assessment against attack; that the use of such methods is not within the permissible range of discretion of taxing officers; that an attempt by the taxing officers to justify the assessment which ends in failure and in a confession that it cannot be justified, and that it is $15,000,000 in excess of the fairest computed values is in itself sufficient proof that the assessment was either arbitrary, irrational, or fraudulent; and that it is not necessary for the taxpayer to submit to such assessments repeatedly, before the courts can grant relief.

Petitioner has already paid 60% of the taxes levied against the assessment in question (R. 81). A temporary injunction

has been issued restraining the collection of the balance of the taxes *pendente lite.*

We submit that the assessment which was levied in 1933 was wholly invalid; that further taxes levied under that assessment cannot lawfully be collected; and that the injunction against the further collection of such taxes should be made permanent.

We believe that the court should find that no assessment can be made under any proper or lawful methods in excess of 80% of the present assessment upon which we have already paid taxes, and submit that the making of a substitute assessment for any larger amount should be enjoined.

Respectfully submitted,

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C. J. MURPHY,
Solicitors for Petitioner,
175 E. 4th St.,
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November 2, 1935.

APPENDIX A.

EXTRACTS FROM SEVENTH BIENNIAL REPORT OF THE NORTH DAKOTA TAX COMMISSIONER TO THE GOVERNOR AND LEGISLATURE FOR THE FISCAL YEARS 1923 AND 1924.

Pages 55 and 56.

"The assessment of public utility property in this state has been a matter of more or less general discussion for a number of years, and consequently, it seems advisable to set forth briefly the method of valuation used in this state and to discuss some of the problems in connection with the making of an assessment of this class of property. This discussion will deal primarily with the assessment of railroad property, as it is the only important class of public utility property in this state. Section 2242, Compiled Laws of 1913, requires the state board of equalization to assess annually at its actual value the franchise, roadway, roadbed, rails and rolling stock of all railroads operating in this state, and also requires that in estimating the value of such railroads, branches and sidetracks thereof, the board shall be governed by the same rules as are provided for the guidance of county and township assessors in valuing other property.

The general taxation laws of this state require that all taxable property must be valued and assessed by the assessor at full and true value. The term full and true value is defined as the usual selling price at the place where the property to which the term is applied is located at the time of the assessment, being the price which could be obtained therefor at private sale and not at a forced public auction sale. The full and true value of any class of property is also defined as the amount of money which the average man desiring to own it

would be willing to pay for it for its ordinary use and the amount the man owning it would be willing to accept in payment for it; in other words, the full and true value is the usual selling price or market price.

Railroads are not bought and sold as a unit under ordinary circumstances and consequently the value of railroad property is ordinarily found by the use of one of three methods; (1) by capitalizing the average net operating income of a railroad for a five year period, or (2) by ascertaining the average total market value of its stocks and bonds for a five year, one year or lesser period, or (3) by a combination of both of these methods."

Page 58.

"The valuation figures which the state tax department placed before the state board of equalization for the year 1924, gave a composite method of valuation. The determination of the system value of a railway was made on the basis of capitalizing net earnings at 6 per cent for a one year, three year and five year period and using stock and bond values for a one year and five year period. The apportionment of system valuation was made to North Dakota on the basis of five factors:

(1) The proportion which all track mileage (including main line, branch line, second tracks, sidetracks, etc.) within North Dakota bears to the all track mileage of the system.

(2) The proportion which gross earnings within North Dakota bears to system gross earnings.

(3) The proportion which car and locomotive mileage within North Dakota bears to system car and locomotive mileage.

(4) The proportion which revenue ton and passenger mileage within North Dakota bears to system revenue ton and passenger mileage.

(5) The proportion which the physical value, that is, the cost of reproduction of the property in North Dakota bears to system cost of reproduction of the property.

The basis of apportionment used is a composite basis. The average of the five ratios above given were applied to the estimated system value of the railroad."

APPENDIX B.

EXTRACTS FROM TENTH BIENNIAL REPORT OF THE NORTH DAKOTA TAX COMMISSIONER TO THE GOVERNOR AND LEGISLATURE FOR THE BIENNIAL PERIOD

July 1, 1928 to June 30, 1930.

Page 50.

"It should be clearly understood that whatever erroneous or incorrect assessments develop in connection with the assessment of public utility property are the responsibility of the tax commissioner and not the state board of equalization. The four ex-officio members of the state board of equalization must depend upon the work of the tax department in connection with the assessment of public utilities. It is impossible for ex-officio board members in the few days devoted to board meetings in the month of August to value the property of hundreds of public utilities located in approximately 2,000 taxing districts throughout the state. The state board is compelled to look to the tax commissioner for guidance and to depend upon

his judgment and the work of his department in the assessment of public utility property. The tax commissioner, however, in order to do the requisite work preliminary to assessment by the state board must have the statutory authority to require utility companies to make such reports as he may need and he also must have at his disposal the necessary funds to pay the traveling expenses incidental to plant inspections and appraisals. In this connection it may be stated that utilities have voluntarily complied with every request that the tax department has made and have manifested a fine courtesy and willingness to cooperate."

Page 51.

"It is generally recognized that a direct commercial or market valuation of that part of a railroad which lies within a given state is impossible and that it is first necessary to determine the value of a railroad as an entirety before it is possible to logically assign a value to that portion within a given state. It has been the practice of the state tax department to determine the value of each railroad subject to taxation in North Dakota as an entirety and then to assign to North Dakota its proportionate share of the system valuation, on the basis of approved factors of allocation.

The market value of railroad property is ordinarily estimated or determined by the use of one or both of the two following methods:

(a) By finding the aggregate average market value of the stocks and bonds of the company as determined by the average price paid by the public for its various securities over a reasonable period of time, or

(b) By capitalizing the average amount earned on the operating property over a period of years at a reasonable rate of return."

Pages 52 and 53.

"In connection with the use of the stock and bond method of valuation of railroad property, it is necessary to distinguish between the value of the property actually used for railroad purposes and the value of other property owned by the railroad company. Such other property, if it lies within the state of North Dakota, will be separately assessed; if it lies outside the state of North Dakota, it is not a proper subject for taxaiton by North Dakota and not a part of the system valuation of the operating property of the railroad and, consequently, must be excluded in determining what proportion of stock and bond values is assignable to operating property.

* * * * * *

It has been the practice of the state board of equalization and of the state tax department to determine railroad valuations on the basis of stock and bond values and capitalized net operating income, giving weight to each of these indices of value.

* * * * * *

ALLOCATION OF VALUATION TO THE ASSESSING STATE. The most serious problem which arises in connection with the assessment of an interstate railroad property is to determine what proportion or amount of the total value of the system lies within the particular state. It is generally conceded that it is impossible to determine the value of a part without reference to the value of the whole, consequently, all taxing authorities and boards in valuing interstate railroad companies first find the value of the whole and then attempt to determine the value of the part which lies within a particular state.

The factors of allocation which are used by the tax department in North Dakota are:

1. All track mileage.
2. Gross earnings.
3. Car mileage.
4. Traffic units.
5. Physical value.

APPENDIX C.

Extract from Pages 5 and 6 of Report of Committee on Interstate and Foreign Commerce of the House of Representatives, 74th Congress, First Session, Report No. 1560, dated July 22, 1935, recommending Passage of H. R. 3263.

THE REASONS WHY THIS BILL SHOULD BE ENACTED IN THE PUBLIC INTEREST

1. If the railroads at one time had, they no longer have a monopoly in the transportation field. Ships and trucks are in position to handle a large part of the traffic that formerly moved exclusively by rail. Since 1920 there has been a tremendous growth of competitive forms of transportation. The intercoastal steamship lines now concededly have a practical monopoly of all traffic transported between the seaboards with the exception of perishables, and reach far inland on westbound traffic, charging lower rates on traffic originating at the interior than charged on traffic at or in the vicinity of the port. This has resulted from the long-and-short-haul provision of the fourth section, which evidently the Commission has interpreted to be the meaning of its provisions as a matter of congressional

policy. Foreign steamships are prevented by law from engaging in domestic traffic.

Principally through Government expenditures providing rights-of-way, large amounts of traffic have been diverted to competitive forms of transportation on inland waterways including rivers and canals. The Government itself engages in a competitive operation on the Mississippi River.

Since 1920 the competition of millions of trucks and busses throughout the country has developed, as has also the competition of pipe lines transporting petroleum, gasoline, and natural gas, supplanting other forms of fuel including coal. Electric lines ship "coal by wire."

The Interstate Commerce Commission itself, in a decision rendered in July, 1933, *General Rate Level Investigation, 1933*, 195 I. C. C. 5, at pages 70 and 71, stated that in 1931 they believed that the depression was the principal cause of the then unfavorable condition of railroad revenues and credit, but that competition of other forms of transportation has grown to such formidable proportions that the opinion expressed in 1931 no longer portrays the situation. The Commission there said:

> "Formerly it was thought that competing motor carriers were taking and would take principally short-haul less-than-carload traffic, and that water carriers would take principally low-grade freight. Time has disproved both of these beliefs. Water carriers are now taking much high-grade long-haul traffic. Trucks are handling less-than-carload freight over long distances and also vast quantities of freight which heretofore has moved on the railroads in carloads, principally commodities which have been most profitable to the railroads."

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as AUDITOR and L. T. HALVORSON AS TREASURER OF BARNES COUNTY, et al., all of the STATE OF NORTH DAKOTA,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER.

F. G. DORETY,
C. J. MURPHY,
Solicitors for Petitioner,
175 E. 4th St.,
St. Paul, Minn.

December 9, 1935.

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GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

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J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor, W. D. Conway as Treasurer and Bert M. Salisbury as Auditor-elect of Benson County; Ole Colbornson as Auditor, Sam H. Wilson as Treasurer, C. E. Hurst as Auditor-elect and Arlan Stair as Treasurer-elect of Bottineau County; H. F. Magedanz as Auditor, Jerry Donovan as Treasurer and Thomas P. Borgen as Treasurer-elect of Burke County; F. Ford Doherty as Auditor, C. A. Baumgartner as Treasurer and Paul H. Eddy as Treasurer-elect of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor, H. J. Oberman as Treasurer and Harry Bjornstad as Treasurer-elect of Dickey County; R. H. Lynch as Auditor, O. A. Steffler as Treasurer, Myrtle Skabo as Auditor-elect and Albert T. Heide as Treasurer-elect of Divide County; S. W. Lyman as Auditor, Hugh Peoples as Treasurer and S. K. Haugland as Auditor-elect of Eddy County; J. B. McWethy as Auditor, M. P. Roberts as Treasurer and Alice Cole as Treasurer-elect of Foster County; Martin O. Haugen as Auditor, John Sandbek as Treasurer and Albert Brenna as Treasurer-elect of Grand Forks County; P. A. Melgard as Auditor, R. J. Howden as Treasurer, R. J. Howden as Auditor-elect and H. B. Nelson as Treasurer-elect of Griggs County; E. W. Olson as Auditor

and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor, Oluf Erickson as Treasurer and O. M. Fritsvold as Treasurer-elect of McKenzie County; F. J. Haines as Auditor, Nels Hofland as Treasurer, M. L. Glarum as Auditor-elect and Sadie Hofland as Treasurer-elect of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor, J. H. Hannesson as Treasurer and Norval W. Hodgson as Treasurer-elect of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor, W. C. Budke as Treasurer, W. E. Coutts as Auditor-elect and Einar Johnson as Treasurer-elect of Renville County; George J. Fischer as Auditor, Karl L. Mikkelson as Treasurer and Einar Vohnson as Treasurer-elect of Richland County; Jas. H. Penny as Auditor, Allister McKay as Treasurer and E. M. Anderson as Treasurer-elect of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. J. Mustad as Auditor, Florence Carlson as Treasurer and Ella B. Johnson as Treasurer-elect of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortenson as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONER.

RESPONDENTS' ARGUMENT TO THE EFFECT THAT THERE IS NO SHOWING AS TO WHAT IF ANY METHODS OF COMPUTATION WERE USED BY THE BOARD OF EQUALIZATION.

The defense in this case is based largely on a process of implying to us arguments that we have not made and then of ably refuting them. The respondents set up men of straw of their own manufacture and then very successfully knock them down.

To begin with, respondents vigorously deny the contention that the Board adopted any exact computation to the last odd dollar and cent, or the exact result of any formula, in making its 1932 assessment which was adopted in 1933. Respondents repeatedly assert that there is "not one word of evidence in the record" to support this contention.

This, of course, is a contention that we have never made. We have never contended that the Board adopted the *exact* result of the computations in 1932. What we do contend is that these computations furnished the controlling reasons why the assessment was in the neighborhood of $79,000,000 rather than thirty or fifty or sixty million. We claim that the *approximate amount* of the assessment was largely governed by such computations, and that as a result of the dominating influence of these computations, approximately $30,000,000 of obsolete values and approximately $20,000,000 of out-state values were included in the assessment.

That these computations were given dominating weight is proven by the facts: (1) that the computations were made; (2) that presumably they were not made vacuously or without purpose; (3) the Answer admits that the assessment was in

fact based upon these computations "and other evidence"; (4) it was admittedly impossible to come within forty or fifty million dollars of the amount of the assessment without using these computations or similar ones; (5) no other method which would come within forty or fifty million dollars of the assessment is shown; (6) the respondents' tax expert knew of no such method and after many months of study had been unable to discover any.

The respondents apparently contend that the assessment is not tinged with any unlawfulness unless it is in the exact amount of an unlawful computation, and that it is immunized against attack if the amount of the unlawful computation is changed by a tenth of a per cent. before entering it upon the assessment rolls. Our contention is that the assessment is unlawful if it is substantially affected by unlawful computations; that we are not required to explain how the exact amount was arrived at; that it is sufficient if we satisfy the court by convincing evidence that several million dollars worth of out-state values or of obsolete values are included in the assessment. If we are wrong in this, then this part of our case must fail and we must rely entirely upon the fact that the assessment is approximately treble the actual current commercial value of the property and that the respondents admit that it cannot be justified by any computation that they know of.

What the record actually shows is summarized in paragraph G of the Answer which admits in *haec verba* that system values *were* determined from five years' earnings and stock and bond prices; that the system value so determined *was* apportioned to North Dakota upon the mileage ratios, not once, but three times, with three different variations; and "that *upon this evidence* * * * the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024."

The row of stars in the last quoted sentence indicates the omission of the words "and upon all other evidence and matters of common knowledge before it". We have first omitted these words from the quotation in the last paragraph, and then set them forth here, because it is upon the insertion of these words that the entire argument of the respondents is based. This paragraph G of the Answer appears on pages 26 and 27 of the record and is quoted in full on page 18 of petitioner's original brief.

It is because the 1932 assessment differed by approximately 1/10 of 1% from the average of the three computations set forth in paragraph G of the Answer, and because the Answer, in addition to admitting that these computations were made, and that the assessment was based upon them, also asserts that it was based upon other evidence and common knowledge as well, that respondents make this repeated assertion that the record is barren of even the slightest indication that the Board made any use whatever of any earnings or stock and bond prices for any five year period or any other period or that it made any use of any mileage prorates or any other prorates, or that it used any method whatever.

We have discussed this contention quite fully under Point A2 on pages 17 to 24 of petitioner's original brief.

In addition to contending that there is nothing in the record to indicate that any use was made of earnings or stock and bond prices for the five years ending in 1931, or of mileage prorates, the respondents attempt to show that even if these methods were used, it was proper to use them. The following is a brief synopsis of these arguments of the respondents and of our replies to them.

RESPONDENTS' ARGUMENTS TO THE EFFECT THAT THE BOARD WAS JUSTIFIED IN IGNORING ALL STOCK AND BOND SALES AND ALL EARNINGS MADE IN THE YEAR OF THE ASSESSMENT OR IN THE PRECEDING YEAR AND IN BASING THE ASSESSMENT UPON SALES AND EARNINGS OF THE BOOM PERIOD.

Here again the respondents very ably refute two arguments which they impute to us but which we have never made and which we would be foolish to make. The contentions wrongly imputed to us which respondents so ably refute are: (1) a general contention that the Board is required by law to base its assessment upon some sound mathematical computation or formula; and (2) the particular contention that in 1933 any assessment would be unlawful unless computed solely from 1932 earnings and stock and bond sales and on the cost of service apportionment illustrated in Mr. Turnburke's Exhibit 12.

Of course, we do not make either contention. We agree that the Board is not required to capitalize the earnings of 1932 or of any other period, nor to make its assessment conform to 1932 stock and bond prices, nor to any particular computation or formula. We simply claim that it is irrational and arbitrary to ignore current conditions and current values entirely during a period when a great shrinkage in values has taken place. We claim that in adopting for 1933, the 1932 assessment, based on data ending in 1931, the Board necessarily ignored everything that had happened in 1932 and 1933, thereby ignoring the fact that the worst year of the depression had occurred since the 1931 figures were completed; that our earnings had

shrunk 95%; and that stock and bond prices had shrunk 50%. We contend that the 1932 assessment had been largely governed by the average earnings of $25,000,000 a year for the five years ending in 1931, and that the Board should not have adopted the same assessment when, for nearly four years ending in 1933, our earnings had fallen to $12,000,000 a year, and to $1,290,000 in 1932. We contend that the 1932 assessment was largely governed by stock and bond prices of nearly $600,000,000, and that it should not have been adopted without change in 1933, when stock and bond prices had fallen to less than $300,000,000. We do not contend that this court or any other court would have power to compel the Board to adopt the exact result of any particular computation or formula, and we have never even suggested that the assessment should be reduced to anything like the extent indicated by the shrinkage in our 1932 earnings. Some of the particular arguments advanced by the respondents on this phase of the case are as follows:

(1) It is first argued that stock prices had fallen from an average of 383.17 in September, 1929, to 41.22 in July, 1932; that the prices of the latter date had fallen so low as to be worthless as evidence of value; that these prices were based on fear and panic and not upon investor's judgment; that they were due to the export of gold, the freezing of banking assets, the forced sale of securities and similar emergency conditions; and that the Board was, therefore, justified in totally ignoring all earnings and all stock and bond sales which had been made in 1932 or in 1933. See pages 4, 23, 36, 58, 63 and 64 of Respondents' Brief.

Our reply is first, that the stock prices quoted are from the peak of the boom and the depth of the depression and that the spread between the quoted figures greatly exaggerates the

actual shrinkage which had occurred as reflected by average prices over the years 1932 and 1933. We have never suggested that the Board should have paid any attention to the lowest prices on the lowest day of the depression.

It should also be noted that the great shrinkage which the respondents point out was a shrinkage in equities and not in bonds or in total security prices. A relatively small shrinkage in the actual value of a property may result in a much greater shrinkage in the stock prices. If a property is capitalized with 60% bonds and 40% stock, a shrinkage of only 40% in the value of the property would destroy the equity and wipe out the stock value entirely, but the value of the total securities including the bonds should still be at 60% of its former level. Great Northern stock had fallen to 13½, but the total value of Great Northern stocks and bonds had fallen only from a little over $600,000,000 to slightly under $300,000,000.

We are not contending that the Board of Equalization should have reduced its assessments in proportion to the shrinkage in *stock prices*, either at the lowest date in 1932, or for the year as an average. We have not suggested anything more than that they should *consider* the shrinkage in *total security prices* for the year as an average, which would amount to something like 50%.

The emergency economic conditions mentioned by the defendants might afford some justification to the Board for refusing to be governed entirely by the market prices of 1932 and 1933, even with bond prices included. The Board might have been justified in making its reduction something less than 50% because of these conditions. But surely it was not justitfied in entirely ignoring the sales and earnings of 1932 and 1933, nor in acting as though the boom were still flourishing, and as though there were no depression at all. The 1932 assessment

was only 5% less than that for 1929, and the same amount was adopted as the assessment for 1933, although in the meantime, there had been a 95% shrinkage in earnings and a 50% shrinkage in stock and bond prices. We submit that even though the Board were justified in discounting depression figures, it was not justified in ignoring them, or in assessing our property on the same basis that it would have used if the boom were still continuing and if there had been no depression.

(2) Another argument frequently repeated by the respondents for ignoring the current market prices is that Great Northern stock had paid $92 in dividends over a period of 17 years and $20 in dividends during five years ending in 1930, while the average market price of the stock in 1932 was only $13.20. See page 11 of Respondents' Brief. This fact is relied upon as proving that the investors did not know what they were doing in 1932 and were not using good judgment, and that 1932 stock prices should therefore be given no consideration.

We have pointed out above that a relatively small shrinkage in the total value of a property may wipe out the equity value of the stock entirely. Similarly a relatively small shrinkage in earnings may wipe out stock dividends entirely while still leaving sufficient income for all bond interest. The large dividends of prior years represented a comparatively narrow and always precarious margin above interest requirements, and one that might easily be, and that actually was completely wiped out by a shrinkage in earnings. For the four years ending in 1933, the Great Northern Railway Company failed by many millions of dollars to earn its bond interest. The fact that investors could see small hopes of dividends for some years to come and that they discounted the value of the stock accordingly furnishes no impeachment of their judgment.

And here again we would remind the court that while Great Northern stock had fallen to $13.20 in 1932, the bonds had fallen off very slightly as shown by Exhibit B, which indicates that investors had not entirely lost their judgment or yielded to hysteria, and the total value of both stocks and bonds had fallen off only a little more than 50%. We repeat that even though the Board may have been justified by these unusual economic conditions in discounting the depression shrinkages and in not reducing the assessment to the entire extent called for by the shrinkage in stock and bond prices, it was certainly not justified in ignoring this shrinkage entirely and in continuing to assess the property as though the boom had never ended.

(3) Another argument advanced by the defendants is that it would be a discrimination in favor of railroad property and against all other property if railroad assessments should be reduced in proportion to the shrinkage in earnings and stock and bond prices; that most other properties had lost all of their earning power; that if all assessments were reduced in proportion to the shrinkage in current earnings vast classes of property would have no value and would escape assessment entirely, and the state would not be able to collect enough revenue to enable it to function. (Respondents' Brief, pp. 12, 22, 23, 65.)

In reply to this we would point out that while the evidence shows a shrinkage of 95% in the net earnings of the Great Northern Railway Company and of 50% in its stock and bond prices in 1932, there is no evidence whatever in this record as to the extent, if any, to which values of other properties had fallen, or as to the extent of the shrinkage, if any, in their net earnings. The defendants offered some evidence, over our objection, as to the shrinkage in *gross* income of *farms* but

nothing as to the net income or value of farms and nothing whatever as to any other property. The average assessed value of farm property had been reduced 25% (R. 82), while the assessment of the Great Northern Railway Company was reduced only 5%. There is no evidence whatever in the record to indicate that the reduction made in the assessment of farm property was not entirely adequate to conform to the change in its actual value. The presumption is that the tax officers were obeying the law and assessing farm property and all other property at its actual current money value. If other classes of property were deliberately assessed in excess of their actual current money value, their owners had the same remedy that we have.

And after all, this is another case of answering a contention that we do not make. Respondents point out that it would not be practicable to reduce the assessment on other property in proportion to the depression shrinkage in earnings and they, therefore, argue that railroad assessments should not be reduced in proportion to the shrinkage in depression railroad earnings. We have never claimed any such thing. Our earnings had shrunk 95%. We are not asking for a 95% cut in our assessment. We are simply protesting that the loss in earnings and loss in value was entitled to *some* recognition and that it was arbitrary and irrational to ignore it *entirely* in the case of railroad assessments. Reduced values in the case of farm property were recognized by a 25% reduction in assessment, and we submit that the shrinkage in the value of our property was entitled to at least that much recognition, even assuming that uniformity with other property precluded any more.

(4) The respondents further argue (Brief p. 35) that a consistent use of five year figures over a long period of time will average out in the end and produce the same net result

as though the assessment for each year were based upon the figures for that year only.

The respondents' tax expert, who advanced this argument in his testimony, admitted that its validity, if it has any, would depend upon the *continued and constant* use of figures for the five year period *immediately preceding the assessment*, in periods of falling prices as well as in periods of rising prices (R. 191). In making its 1933 assessment, the Board of Equalization failed to make the usual computation and refused to be governed by the figures for the five years immediately preceding the assessment. If it had done so, the assessment for 1933 would have been more than $15,000,000 less. Even if we were to grant that the consistent and continuous use of five year figures would justify the practice in a situation such as existed in 1933, this justification would not aid the state here because it departed from the usual practice and based the assessment for 1933 upon five years ending in 1931 instead of five years ending in 1932.

(5) Respondents point out (Brief pp. 33, 64) that we had taken no steps to enjoin the 1932 assessment; that the Board was, therefore, justified in assuming that it was a fair valuation for 1932; and that as the physical property and physical operations still remained intact in 1933, it was justified in assuming that the same value existed in 1933.

This might have been true if the Board had been in ignorance of the profound shrinkage which had occurred after the 1932 assessment was made. But the attention of the Board had been expressly called to the fact that figures which had become available since the 1932 assessment was made showed a decrease of 20% in gross operating revenues, 90% in net railway operating income and 35% in the market value of stocks and bonds (R. 297). The depression was a year older in 1933.

The boom period was a year farther behind. Depression conditions had become much worse and the shrinkage in stock and bond prices and earnings had become much greater. We submit that it was not the rational act of a reasonable body of men to blind their eyes to these facts and to totally ignore them, or to assume that an assessment based on 1927-1931 figures, would still be fair and reasonable in the light of 1932 and 1933 experience.

(6) Finally, respondents argue, on pages 58 and 59 of their brief, that every step in the computation of railroad value requires arbitrary assumptions; that the whole process is necessarily an arbitrary one; that the Board's discretion is necessarily absolute as to which arbitrary assumptions shall be made, and that, therefore, all restrictions of reason and logic are off, and that it is entirely competent for the Board to arbitrarily ignore the current value of the property and to levy its assessment against values of a prior period which are no longer in existence.

A clear statement of this argument condemns it. No matter how difficult the determination of value may be, and no matter how many assumptions must be made arbitrarily, it does not follow that the Board can properly ignore current values or current conditions and base its assessment upon bygone conditions which it knows to be obsolete, or assess values which no longer exist.

We believe the above to be a fair summary of the arguments advanced by the defendants for ignoring all stock and bond sales and all earnings made in 1932 or 1933 and for basing the valuation upon earnings and stock and bond prices of the boom period. We submit that none of them are entitled to serious consideration.

We desire next to note the Respondents' replies to our argument in regard to the mileage ratios of apportionment.

RESPONDENTS' ARGUMENTS UPON THE QUESTION OF CREDITING $20,000,000 WORTH OF TERMINAL VALUES TO NORTH DAKOTA.

(1) Upon this subject, Respondents first attack Exhibit 12, presented by Mr. Turnburke, which prorated interstate revenue in proportion to cost of service, and which showed that North Dakota produced only about 12% of our system net earnings and therefore contained only 1/12 of the system value. This is attacked upon the ground that it had not been submitted to the Board before the 1933 assessment was made; that it was a new and untried method; that it had never been used in tax cases; and that Mr. Turnburke had never appeared in tax cases and was not a tax expert. (Respondents' Brief pp. 4, 48, 52.)

This suggested method of apportioning system value is not a necessary part of our case. Perhaps it should not have been offered at all. The burden is not upon us to show the state how the assessment should be determined, nor is the state obligated to adopt the very best or most scientific method that there is. Its only obligation in this regard is to avoid taxing outside property. We have shown conclusively that the method followed by the state necessarily assesses $20,000,000 worth of outside property. Whether Mr. Turnburke's method is the best method that could be adopted for avoiding this or whether it has any merit at all; whether it is any better than the method used by the state; whether Mr. Turnburke is a tax expert; whether the method has ever been used before, are all questions which have so little bearing upon the real issue in this case that we will not take time to offer any further defense of this method of apportionment. We believe it to be more

accurate than any other method referred to in this record, but if this is not so that fact is wholly immaterial.

And, of course, since the failure of the Board to use this method is no part of our complaint against the assessment, the fact that we did not present it to the Board before they made their assessment is equally immaterial. The fact that we did not show them a method by which they could avoid assessing property outside the state, in no way justifies them in levying a $20,000,000 assessment against such property.

(2) The Respondents argue (Brief p. 61) that some or all of the five ratios used in North Dakota have been used for many years and in many states and have never been disapproved.

If for many years North Dakota had been assessing a tract of land close to her boundary line, on the mistaken assumption that it was located in North Dakota, and a new survey should then show that it was actually located across the line in Montana, the current assessment would, of course, be canceled at once. Neither the fact that North Dakota had assessed it for many years, nor that the owner had failed to discover the error or to make it known to the assessing authorities until after the assessment was made would have any bearing upon the case.

The same principles apply here. This is a case where North Dakota has assessed terminals in Minnesota and Wisconsin, just as truly as though she had described them by name or by metes and bounds on her assessment rolls. That fact is indisputable. It may be an honest mistake, but when the mistake is discovered by us and pointed out to the court, we are entitled to have that portion of the assessment canceled for mistake or for excess of jurisdiction, regardless of how often or how long the mistake has been continued.

(3) It is argued that the railway company itself used mileage prorates in computing valuations which were submitted to the Board of Equalization and is thereby estopped from criticizing their use by the Board; that in any event the Board was not advised as to the location of terminals and other facts now presented, and that the criticisms which we are now making of the mileage prorates were not submitted to the Board (Respondents' Brief, pp. 5, 16, 46, 47, 49).

It is true that petitioner submitted to the Board, three computations of value, varying from $24,000,000 to $64,000,000, in which mileage ratios of apportionment were used. However, in the same statement (R. 299), it was pointed out that North Dakota's physical property ratio was only 14% of the total for the system, which is "less than any figure used in the composite ratios for allocation," and that the use of the physical property ratio "alone or in combination with any or all of the other factors" would reduce petitioner's computations. The location of the terminals was a matter of common knowledge. It was commented upon by this court in *Wallace v. Hines*, 253 U. S. 66. The comparative topography and geography of North Dakota and the mountain states are well known. Every map shows our net-work of branch lines in North Dakota. The Board was specifically advised that only 14% of our fotal plant was located in North Dakota. It had plenty of information to put it upon notice that the mileage prorates necessarily taxed property outside the state.

There is no suggestion that petitioner deliberately withheld any information from the Board. It could have no object in doing so. The only reasonable conclusion is that if petitioner failed to submit to the Board the precise argument which we are making here, it was entirely innocent, and was due to the fact that petitioner itself had not then come to a full realiza-

tion of the tremendous extent to which the properties outside the state were being assessed. We submit that since this fact has now become known and has been pointed out to the court, we are as much entitled to a cancellation of that portion of the assessment which is beyond the jurisdiction of the state, as we would be in a case where a new survey had disclosed that a tract of land assessed in North Dakota was actually located outside the state. This part of the case does not depend upon fraud, either actual or constructive, nor does it depend upon our proving any lack of diligence or intelligence on the part of the Board. It is based upon proof of the *fact* that the assessment includes properties outside the state. This involves an excess of jurisdiction which cannot be waived by the taxpayer.

(4) That mileage ratios are governed entirely by the road miles in a state, and entirely disregard location of terminals; that they *in fact* fail to credit terminal values exclusively to the terminal states; that they necessarily and automatically spread them over the intermediate states; and that they actually credited $20,000,000 of outside values to North Dakota in 1933, is not disputed. In fact this is perfectly self-evident and mathematically demonstrable and cannot well be the basis of an intelligent dispute.

However, on pages 41 to 45 of their brief, respondents point out that the ratios showing miles of haul in North Dakota correspond very closely with the track mile ratio, indicating, according to the respondents, that the average mile of track in North Dakota is worth about the same as the average mile on the system, since it has the same amount of use.

It is true that a mile of road in North Dakota has almost as many tons, cars and engines passing over it in road haul service as an average mile of road outside of terminals on the balance of the system, and that, therefore, North Dakota road

miles may be nearly as valuable from a use standpoint as average road miles outside of terminals in other states. But the fact remains that under these North Dakota ratios, the entire system value, including all terminal values, is wrongfully divided among road miles and none of it is credited to terminals. These ratios indicate that in the division of system value, North Dakota miles are entitled to nearly as much credit as any other road miles outside of terminals; but no road miles are entitled to any part whatever of the terminal values which are included in the system value, and yet the North Dakota ratios credit road miles with all of the terminal values. It is this latter fact which is nowhere disputed by the respondents.

The respondents' argument simply shows that if the system value including terminal values is all to be credited to road miles, the North Dakota formula is a fair way of doing it, so far as the division between road miles is concerned; but it does not begin to justify the giving of any credit whatever to road miles for any part of the terminal values. *If the terminal values* (which for three terminals alone are about as great as those of the entire property in North Dakota), *were first deducted from the system value*, leaving the balance as the value of the system road miles, then it might be proper to apportion this balance in proportion to miles of track or miles of road, or in proportion to the miles of haul factors. The fact that the ton and passenger mile and car and engine mile ratios for North Dakota are about the same as the track mile ratio would seem to justify this.

But neither that fact nor anything else in the record that the defendants have pointed out tends even remotely to indicate that terminal values were in fact deducted, nor to dispute the fact that these ratios entirely fail to credit terminal values

to terminal states, and that on the contrary they do credit them to intermediate states, and in the case of North Dakota to the extent of about $20,000,000 in the 1933 assessment.

There is some slight attempt on pages 41 and 42 of defendants' brief to show that in one year (1932), the average mile of track in North Dakota carried more traffic than the average mile on the system and that North Dakota had a lower ratio of expense to revenue than the balance of the system. This is submitted as an indication that mileage prorates are fair in spite of the fact that they credit terminal values to North Dakota and not exclusively to the terminal states.

The figures quoted by respondents showing volume of traffic, are based upon the number of traffic units per mile of all track and not per mile of road. They are obtained by dividing the number of tons, cars or engines moved out on the road, by the number of miles of all track including switching tracks and double tracks. The figures in the numerator *exclude* switching *movements,* but the figures in the denominator *include switching tracks.* And a ton moved over one mile of road which is double-tracked would be divided by two miles of all track and would be counted as half a ton mile under this method. This is a distorted method of measuring traffic density and one that has no recognition in common use (R. 212). The sound method is to measure ton miles, car miles, etc. per mile of *road* and not per mile of all track. Measured by this recognized method, the density in North Dakota has never been anywhere near the density on the balance of the system (Ex. 14, R. 241).

The statement from Exhibit L on page 42 of respondents' brief, that the ratio of operating expenses to total revenues in North Dakota is less than on the balance of the system, involves a fallacy which has been pointed out to the respondents, and we think that the repetition of this statement in the brief

is hardly fair to us or to the court. In obtaining the ratio of expense to revenue which is quoted, the revenues credited to North Dakota consist, to the extent of 92%, of mileage prorates of the interstate through revenues. By these mileage prorates no part of the revenue is credited to the terminal, nor assigned for payment of terminal expenses, which constitute 1/3 of the total on the average. On the contrary the entire through revenue is assigned to the haul over the road between terminals, and is divided on a mileage prorate. In this way, North Dakota is credited with all of the revenue which is designed to pay for the road haul she performs and also a large share of the revenue which is designed to pay for the terminal services in other states. By thus crediting her with the terminal revenues, and not charging her with any of the terminal expense, the ratio of her own expense to her own revenue plus a part of the terminal revenue is made to appear very low, while the terminal states, which incur the terminal expense but get none of the revenue which is provided to pay for it, necessarily show a high ratio of expense to revenue. Under this method, in a year when the system as a whole is earning 5%, an intermediate state like North Dakota might be credited with earnings of 20% while the important terminal states would show deficits (R. 213). Under these circumstances, we submit that it is hardly fair to the court to submit a computation purporting to show that North Dakota operates more economically than other states, when it actually shows nothing more than that North Dakota is being wrongfully credited with some of the terminal revenues but none of the terminal expenses.

This sort of argument is the only argument that the respondents have presented in defense of the merits of the mileage prorates. It would have been better for them to have remained

silent. The failure to otherwise dispute, or reply to our argument is to our minds a confession of the vices of the apportionment ratios used in North Dakota. It is an admission that they entirely fail to credit the terminal values to the terminal states, and necessarily spread them over the intermediate states, which means that about $20,000,000 of the 1933 assessment was levied against property outside the state, as truly as though the Seattle and Twin City terminals had been specifically listed on the North Dakota assessment rolls.

The case of *Rowley v. C. & N. W. Ry.*, 293 U. S. 102, is cited by the respondents, as supporting the ton mile and car mile ratios. It is argued on page 43 of respondents' brief, that this case at bar is stronger than the Rowley case because there is less spread here than in the Rowley case between the mile haul ratios and the track mile ratio.

It would rather appear to us that where the mile haul ratios are very much lower than the track mile ratio, as they were in the Rowley case, they tend to lower the average ratio, and therefore to reduce the vices of the objectionable track mile ratio and, therefore, to make a better case for the state than is presented in North Dakota, where the mile haul ratios are almost as high and therefore just as objectionable as the track mile ratio.

Be that as it may, however, not even a declaration or finding by this high court could make that a fact which is not a fact, and if the Rowley decision were to be construed as a finding that, under facts like those existing on the Great Northern Railway and in North Dakota, these mileage prorates allocate the terminal values to the terminal states, and do not spread them over the intermediate states, it would be a demonstrable error and one that should be promptly corrected. We would respectfully refer to the discussion of this case on pages 49 and 50 of our original brief.

MISCELLANEOUS ARGUMENTS.

The respondents offer much argument to the effect that the assessment of railroad property is not an exact science nor a matter of formula; that the Board did not in fact follow any formula or use any method; that it would be unlawful to consider current sales or current earnings in making its assessment, because that would be using a formula, and assessments must be made by judgment and not by formula; that in any event the Board is a lay board without any specialized knowledge of tax theory and economics, and should be indulged on this account in not considering current values and in not following any other particular method or formula; and that on these grounds, the fact that the assessment exceeds any rational computation that can be made does not necessarily condemn it.

We have already conceded that the Board was not obliged to compute a value from 1932 earnings. And if the argument just referred to means that it was not obliged to adopt the exact result, to the last dollar and cent, of any particular method of computation, we concede that. It is not even necessary that the best or most scientific method of computation should have been before it. But on the other hand, it would be arbitrary and irrational to make an assessment by grabbing a number out of the air, without any rational process whatever, and without any idea as to whether the number so seized upon might be several hundred per cent. more or less than the actual value of the property. An assessment so arrived at, if grossly excessive, should be set aside.

In this case the respondents are in a dilemna. Either the amount of $78,832,888 was adopted from the 1932 figure, which in turn was determined because the five year figures ending in 1931 and the mileage prorates seemed to justify an amount

approximately as large as that; or else it was arrived at without any rational process whatever. The undisputed evidence shows that it would be impossible to arrive at any figure within many millions of dollars of the assessment without ignoring 1932 and going back to 1927, and without using mileage ratios of apportionment. The state's own tax expert confessed that even by including five years ending in 1932 and by using mileage prorates, he could not come within many millions of dollars of justifying the assessment.

It follows that the Board either levied a large part of its assessment against values of a bygone economic era and values outside its own state boundaries, in which case the assessment was beyond its jurisdiction and void; or else it failed to function rationally, and determined the assessment by pure guess and without the attempted exercise of any intelligent process whatever, in which case the assessment was wholly arbitrary.

On pages 72 and 73, respondents argue that this was at most a "sporadic case" of over-assessment and, therefore, not subject to correction in court.

The doctrine of the "sporadic case" has been applied in cases where the property owner has complained, not that his own property is overvalued, but that other classes of property are undervalued, resulting in discrimination. So far as we can find, this doctrine has been applied only in discrimination cases. It has been held that where the property in issue is not overvalued, but other property is relatively undervalued, this will not entitle the owner to court relief if it is a mere sporadic case, nor unless it is a deliberate and continuous policy. We know of no case where this doctrine has been applied in a case where relief is asked, not on the ground of discrimination through relative underassessment of other property, but on the ground of gross overvaluation of the property in issue. And

certainly it would not apply to a case of assessment of property outside the state or to the assessment of obsolete values known to have disappeared.

On page 73, respondents contend that we have failed to do equity because we have paid upon an assessed value of some $47,000,000 whereas in our brief before the State Board we asked that the assessment be fixed *not in excess* of $60,000,000.

In that brief, we had computed one value of $46,903,462 and another of $24,733,390, all based upon mileage prorates. We had also pointed out that the physical property ratio would reduce all of these amounts, and the figure of $60,000,000 was mentioned as a maximum.

Our tax representative seems to have felt that $60,000,000 was as low an assessment as he was likely to get from the Board, and that it would be useless to ask for less, and better to accept that from the Board than to have to go to court. This offer was not accepted by the Board, and we were forced to go to court for our relief. The fact that we were willing to accept an assessment of $60,000,000 if levied without court contest, does not preclude us, when forced into court, from showing that the actual value was much less than that.

We submit that the question as to the amount of the tender which should be made in order to get into a court of equity is a question that must rest largely in the discretion of the trial court when the tender is first made. The trial court entertained jurisdiction and granted a temporary injunction upon this tender, and until now, no exception has been taken upon the ground that the tender should have been for a larger amount. We submit that if this contention would ever have had any merit, it is too late to raise it now.

In conclusion, we submit that paragraph G of the Answer admits specifically and concretely that the Board deliberately

ignored all earnings, all stock and bond sales and all evidence of value which had come to light during the years 1932 or 1933; that it based its assessment upon boom period earnings of $25,000,000 a year when the actual average earnings for the four years ending in 1933 were less than $12,000,000; that it based its assessment largely upon stock and bond prices of nearly $600,000,000 when the actual price at which the stocks and bonds were being sold in 1932 and 1933 were less than $300,000,000; that it thereby computed a system value of $415,000,000 (Exhibit P), when the actual system value was not over $200,000,000; that it included in said system value, probably $100,000,000 belonging to terminals, shops, tunnels and extraordinary construction in other states; that it credited to North Dakota nearly 19% of the value, not only of the ordinary road miles, but of the terminal properties, tunnels, etc. as well; that it failed entirely to credit the terminal values back to the terminal states, but spread them all over the miles of road; that whereas North Dakota actually contained less than 14% of the physical plant, and produced only about 12% of the service and earnings, it assessed not only the 14% located within its own borders, but an additional 5% of all the property located outside; that for all of these reasons, the assessment was beyond its jurisdiction and void; and that, even without any proof of the use of improper methods, the assessment is condemned by the fact that it is treble the amount of any fair commercial appraisal of current value, and that respondents have not rested upon the presumption of validity

but have attempted to justify the assessment and confessed their inability to do so.

Respectfully submitted,

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December 9, 1935.

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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner, and Appellant below,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE AS AUDITOR AND L. T. HALVORSON AS TREASURER OF BARNES COUNTY, ET AL.,
Respondents, and Appellees below.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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GREAT NORTHERN RAILWAY COMPANY,
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vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE AS Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor and W. D. Conway as Treasurer of Benson County; Ole Colbornson as Auditor and Sam H. Wilson as Treasurer of Bottineau County; H. F. Magedanz as Auditor and Jerry Donovan as Treasurer of Burke County; F. Ford Doherty as Auditor and C. A. Baumgartner as Treasurer of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor and H. J. Oberman as Treasurer of Dickey County; R. H. Lynch as Auditor and O. A. Steffler as Treasurer of Divide County; S. W. Lyman as Auditor and Hugh Peoples as Treasurer of Eddy County; J. B. McWethy as Auditor and M. P. Roberts as Treasurer of Foster County; Martin O. Haugen as Auditor and John Sandbek as Treasurer of Grand Forks County; P. A. Melgard as Auditor and R. J. Howden as Treasurer of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor and Oluf Erickson as Treasurer of McKenzie County; F. J. Haines as Auditor and Nels Hofland as Treasurer of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of

Nelson County; Wm. W. Felson as Auditor and J. H. Hannesson as Treasurer of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor and W. C. Budke as Treasurer of Renville County; George J. Fischer as Auditor and Karl L. Mikkelson as Treasurer of Richland County; Jas. H. Penny as Auditor and Allister McKay as Treasurer of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. H. Mustad as Auditor and Florence Carlson as Treasurer of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mortensen as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents, and Appellees below.

RESPONDENTS' BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

I. SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner's summary statement of the matters involved presents a somewhat lengthy and out-of-focus picture of the matters involved in this case. We believe the statement of

the Circuit Court of Appeals, in the opinion by Judge Stone, is much more concise and accurate:

> "Appellant here presents two main contentions. Both of them are based on the proposition that the assessment is grossly excessive. The first contention is that this excess is caused by including within the assessment property outside of the State of North Dakota. The second is that the excess was occasioned by the arbitrary action of the Board" (R. 310).

A reading of the opinion of the Circuit Court of Appeals, as set forth at page 309, *et seq.*, of the Record, as well as the specification of errors set forth at page 28 of Petitioner's Brief herein, will disclose that these were the issues; that the only issues are really questions of fact; and that all such questions were determined adversely to petitioner's contentions by the District Court and the Circuit Court of Appeals.

II. REASONS RELIED ON IN OPPOSITION TO THE ALLOWANCE OF THE WRIT.

1. The questions involved are purely questions of fact determined adversely to petitioner's contentions by both Courts below. The specifications of error (p. 28, Petitioner's Brief) all concern the conclusions of the Circuit Court of Appeals upon questions of fact only.

2. The Circuit Court of Appeals has not rendered a decision in conflict with any decision of another Circuit Court of Appeals, and no such conflict is urged by petitioner.

3. The Circuit Court of Appeals has not rendered a decision in conflict with any decision of this Court, but has conformed strictly to the decisions of this Court. The cases cited by petitioner are not in conflict with this decision:

(a) *Pennsylvania Railroad Co. vs. Jacoby & Co.*, 242 U. S. 89, holds only that the question of whether or not an unlawful method of computation was used should have been submitted to the jury. The issues here were submitted to the Court, and the Court specifically found that no unlawful method was used by the State Board (Findings 6 and 9, R. 52).

(b) *Chicago, Burlington & Quincy R. R. Co. vs. Babcock*, 204 U. S. 585, simply holds that members of the State Board should not be cross examined "with regard to the operation of their minds in valuing and taxing the roads." It does not, as contended for by petitioner, prohibit their examination as to the facts before them, or as to whether any formula or other method was followed, or as to whether the valuation was simply the result of a judgment formed upon consideration of "facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies," and matters of common knowledge. Had petitioner desired evidence on these matters, the members of the State Board could have been called and required to testify.

(c) *Fargo vs. Hart*, 193 U. S. 490, and *Wallace vs. Hines*, 253 U. S. 66, both hold that the use of relative track mileage as the *sole* basis of allocating railroad values among the states is, in some cases, unjustifiable, but no case is cited which disapproves the use of the average between the "use" factors and the track mileage factor, as the State's witness used it. In fact, in the case of *Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102, it appears that this Court approved the use of these very factors under circumstances much more adverse to their use than in the instant case.

(d) *A., T. & S. F. Ry. Co. vs. United States*, 284 U. S.

248, simply holds that the Interstate Commerce Commission should have granted a hearing to consider such evidence of changed economic conditions as might have been offered. The evidence in the instant case discloses that the State Board had a hearing, at which petitioner appeared and presented all the evidence and argument it wished, and while the evidence offered before the Board concerning the effect of the depression was negligible, the presumption is that the Board considered it for what it was worth.

3. The State's only witness did not "confess" he could not justify the assessment. He fairly and frankly discussed and analyzed the various customary methods of arriving at railroad valuations by arithmetical calculations and formulae, and disclosed the unreliability of all of them under the circumstances existing in 1933 when the assessment was made. He did frankly testify that none of the formulae with which he was familiar would produce an assessment equal to that made by the State Board, but the state statute does not permit the use of formulae as the final test of value; and the witness justified the assessment by his general statement as to the unusual circumstances existing at the time the assessment was made.

4. A consideration of this case on its merits by this Court will result only in a conclusion that North Dakota either did or did not over-assess the Great Northern Railway in 1933. No new question of federal law will be settled. All questions of law have been elaborately covered by previous decisions of this Court, and particularly by *Rowley vs. C. & N. W. Ry.*, 293 U. S. 102.

5. The tender and payment of taxes admitted to be due by the Great Northern Railway was only sixty per cent of the taxes levied. The record clearly demonstrates that such

a low figure as sixty per cent could be reached only by the use of a new and untried theory of valuation. It is undisputed that no such method was ever presented to the Board in this matter or any other. In fact, this method has never been used by any railroad or tax commission so far as any of the witnesses knew and it was prepared subsequent to the making of the assessment. There is grave doubt as to the verity and usefulness of the proposed method (see Opinion of the Court below, at page 316 of the Record). In its brief before the State Board, petitioner asked "that the Great Northern assessment be fixed at an amount not in excess of $60,000,000." The assessment was fixed at $78,832,888. The tender and payment of the petitioner was on the basis of an assessed value of $47,000,000, some $13,000,000 less than the assessment requested of the State Board by the petitioner. Reduced to taxes, the petitioner has tendered and paid nearly $300,000 less than would have been payable upon the basis of the assessment of $60,000,000 requested by petitioner. We believe this discloses an entire failure on the part of the petitioner to do equity in the premises, and should deprive the petitioner of any recourse in a court of equity.

III. STATEMENT OF THE CASE.

Petitioner has divided its statement of the case into several subdivisions, each of which requires some correction or elaboration to disclose the situation actually before the Courts below. For the convenience of the Court, we use the same headings used by petitioner.

(a) ADMITTED EXCESSIVENESS OF THE ASSESSMENT.

Respondents do not admit and never have admitted the assessment to be excessive.

No method of determining the assessed value is provided by law. The State Board is simply required to assess the property and franchise at "its true and full value in money" (Par. IV, Complaint, R. 4).

The members of the State Board were not called as witnesses. All testimony was based on computations of expert witnesses. Plaintiff's Exhibit 19 (R. 243) shows one extreme, a computed value of $23,937,317, or less than one-third of the $78,832,888 assessment. Defendants' Exhibit Q (R. 279); in schedule 3, is the other extreme in the testimony, showing a computed value of $74,967,983 (about 95% of the assessed value) when the composite of stock and bond values and capitalization of earnings is used, and $78,950,083 (a little over 100% of the assessed value) when the capitalization of earnings method alone is used for determining system value.

Much is made of the fact that the answer and the State's witness Baker "admit" that the five factor ratio is the best and most accurate method of computation. It is true that this is urged as the most accurate method of allocation of system value to the states, but this is only one step in the process of computing value by arithmetical formulae—the first and most important step is the determination of system value. In addition, the "admissions" relied on are concerned only with the relative merits of various formulae—and both the answer and the testimony of Mr. Baker, as well as the testimony of the railroad's own tax expert, Mr. Schoettler, make it clear that these formulae are no more than aids to a determination of either system value, or the value of prop-

erty within any given state. Mr. Schoettler, the Deputy Land, Tax and Right of Way Commissioner for the railroad, and the only tax expert used by petitioner, frankly admitted that "no method has yet been developed which can in an exact scientific manner fix the true value of the state's share of an interstate railway. In each case all the surrounding facts and circumstances, the conditions and the times and all that sort of thing have to be taken into consideration in order to arrive at a reasonable approximation of true value, as well as the peculiar conditions of each road" (R. 86).

Mr. Baker, the State's witness, testified: "As to my statement that the excess in the 1933 assessment over the results produced by any of these tables operated to some extent to condemn the 1933 assessment, I will say that the very best statistical evidences of value are not definite proof of value and there were a number of peculiar and extraordinary circumstances for the Board to consider in 1933 that are not in any way indicated by the statistical exhibits. I do not feel that the variance from the results produced by my table presents an absolute showing of wrongful assessment on the part of the State Board."

Among the peculiar and extraordinary circumstances existing in August, 1933, when the assessment in question was made, were the following: Stock and bond prices during the years in question were a matter of panic psychology, not of sound judgment of investors as to values. As an illustration, the Dow-Jones & Company averages of thirty industrial stocks fell from 383.17 in September, 1929, to a low of 41.22 in July, 1932, and the average of twenty rails fell from 189.11 in September, 1929, to 13.23 in July, 1932. The total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and

one-half billion dollars in September, 1929, to fifteen and one-half billion dollars in July, 1932 (R. 147). These figures indicate the utter unreliability of market price of stocks and bonds as an indicator of actual value of the underlying property.

With reference to the stock of the Great Northern Railway, Exhibit C (R. 253) gives a complete picture of the history of Great Northern stock for the 17 year period prior to the assessment date. The 17 year period is used for the reason that it is the period within which the stock should have earned $100.00, had its annual return been 6%. The exhibit shows the stock had earned $131.39 in these 17 years, and had paid $92.25 in dividends. The corporate surplus had increased from 106 million in 1916 to 149 million in 1934. In the five years preceding the assessment year the stock had earned $10.11 in 1928, $10.31 in 1929, $7.25 in 1930, $2.14 in 1931, and nothing in 1932. During the same five years dividends of $5.00, $5.00, $7.50, $2.50 and nothing had been declared. Thus in the preceding five years stockholders had received actual dividends of $20.00—yet the average market price for 1932 was only $13.20. This Exhibit C, together with the explanation thereof at page 157 of the Record, is convincing evidence that the results of any formula based in any part upon stock prices were not to be trusted in 1933.

During the months of May, June and July, 1933, immediately preceding the assessment, we were in the middle of a minor boom, and there had been a tremendous upward trend in the stock and bond market. There was a very sharp rise in Great Northern stock at that time (R. 207). The various formulae used do not take into account any stock and bond prices after the end of the last calendar year preceding the assessment.

The assessment of general property in North Dakota had not been reduced in conformity with the drastically decreased economic return from property, and could not be so reduced without so drastic a reduction in revenues as to endanger the continuance of the functions of government. The mere fact that the securities representing a certain class of taxable property are quoted on the market, and the earnings are readily available, should not entitle that class of property to preferential treatment. Farm property constitutes about 65% of the total taxable value in North Dakota. The economic return from such property has decreased about 75% as compared with the 1924-1928 average. There has been no net return on the investment (R. 149).

The plaintiff's allegation that the assessment is excessive being denied in the answer (Pars. B and D, R. 23; Par. F, R. 26) and neither counsel nor witness having admitted the assessment to be excessive, it is obvious that there is no "admitted excessiveness" in the assessment.

(b) Factors in 1932 Assessment Making Its Adoption in 1933 Unlawful.

It is true that the 1933 assessment is the same as the 1932 assessment, except for a reduction of $17,136, and that the assessment per mile of track for these two years is identical. We do not concede, however, that this is any evidence that the Board failed to consider the situation existing in 1933 in making its 1933 assessment. The facts in this connection are concisely stated by the Circuit Court of Appeals as follows: "The evidence reveals the following: that the Board had before it data and calculations, by various methods, presented by appellant (the railroad) which referred to the 1933 assessment; that in *prior* years, calculations by various

methods prepared by the deputy Tax Commissioner had been before it; that before 1933, it had 'used' the five factor method (to what extent or just how does not appear); that the assessments of former years had never tracked any of the known methods; that, measured by any of the methods, the assessments for 1929 were approximately 101%, for 1930 approximately 96%, for 1931 approximately 97% and for 1932 approximately 101%; that by any of the methods, the assessment for 1933 was from 115.27% to 121.72%; that since 1918, the movement of annual assessments of appellant's property by the Board had been as follows: in 1919 a reduction of 4% ($3,683,000), in 1921 a reduction of 5% ($4,332,252), practically no change until 1929 when an increase of 1.25% ($1,028,291), no appreciable change in 1930, in 1931 a reduction of $294,691, in 1932 a reduction of 5% ($4,149,973), in 1933 no change; that no formula nor combination of formulae has been found to be an accurate measure of value; that formulae are merely methods worked out to aid in solving the difficult matter of value; that there is decided difference of opinion between students of values as to the relative worth of different formulae and as to their use in different situations; that there is no evidence of any deliberately arbitrary or wrongful assessment concerning years prior to 1933; that there is no evidence of what use was made by the Board of any formula either in 1933 or prior years; that there is no evidence as to how the Board reached its results in 1933 or prior assessments" (R. 317, 318).

The facts set forth at pages 8-9 hereof disclose additional considerations which the Board had the right to consider in refusing to reduce the 1932 assessment in 1933.

Plaintiff on page 17 of its brief, discusses the testimony of the witnesses Beideman and Turnburke, in which they

analyze the situation of the railroad, and paint a very dark picture of its future. The State Board was not given the benefit of these prophecies (Ex. Z-2, R. 295).

(c) Proof That Mileage Prorates Were Actually Used in Making the Assessment.

Petitioner contends that the answer does not deny and therefore admits that mileage prorates were used in allocating system value to North Dakota. It is true that the defendant did not deny paragraph IX of the complaint as fully as might have been done, but the answer does fully and completely deny that *any* formula was used by the Board, and that any use thereof by the Board as the final and conclusive determination of value would have been in violation of the statutory duties of the Board. See, particularly, paragraph E of the answer (R. 24). This contention is so completely answered by the opinion of the Circuit Court of Appeals (R. 312) that we will give it no further notice.

Petitioner then copies certain figures from Exhibit P, schedule 4. For the five years shown on Exhibit P, we find that in 1929 the assessment was 5.41% higher than computed value; in 1930 it was .18% lower; in 1931 it was .41% higher; in 1932 it was 4.29% higher; and in 1933 it was 24.52% higher than the computed value, if the computation is based upon the disputed formula. When the use of a system or formula produces variations from the assessment of 5.41%, .18%, .41%, 4.29% and 24.52% in as many years, it quite clearly appears that the formula was not used in making the assessment. The contention is well answered by the Circuit Court of Appeals thus: "From this quotation, it is clear that the proof of the *fact* that the Board used

the above five factor method is based on the *conclusions* that because the Board's assessments for several years before 1933 were not far from what would have resulted by the use of that method and because the assessment of 1933 was the same as for 1932, it must follow that such method was carried into the 1933 assessment. But the 1933 assessment is appreciably above the result which would have been reached by applying such method. No member of the Board was a witness. No witness pretended to know all that the Board might have considered. * * * We think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method and, therefore, is in no position to urge the contention that property outside the state has been brought into this assessment" (R. 313, 315).

Petitioner has great difficulty in distinguishing between evidence as to what the State Tax Commissioner did, and what the State Board of Equalization did; and the same difficulty in distinguishing between the testimony of the witness Baker as to his opinions; and evidence as to what the State Board of Equalization considered or did. The record is clear that the Tax Commissioner made computations for the assistance of the Board, but the Board *never* adopted these computations. It considered them and the computations presented by the railroad, and all other matters before it, and then used its honest judgment.

(d) PROOF THAT MILEAGE PRORATES ACTUALLY ASSESS PROPERTY IN OTHER STATES:

Since there is no proof that the so-called mileage prorates were used by the State Board, our position is that any discussion of their effect, if used, is unwarranted, except in

connection with the general question of the actual market value of the railroad.

The record discloses that none of the objections to the use of the so-called mileage prorates as testified to by the witness Turnburke were made at the hearing before the State Board. In fact, the brief presented to the State Board by the railroad was based entirely upon the use of the very factors most vigorously attacked by the railroad at the trial (Ex. Z-2, R. 295, particularly at page 301).

The "grossly absurd" results produced by the use of the so-called mileage prorates and referred to at pages 25 and 26 of Petitioner's Brief have no application to the instant case. Mr. Turnburke admits, "I do not know of any situation which affects the state of North Dakota similar to the absurd result produced by allocating the revenues from ore shipments between Minnesota and Wisconsin on a mileage prorate. That illustration concerns only Minnesota and Wisconsin" (R. 127).

IV. ARGUMENT.

Once more, for the convenience of the Court, we will follow the subdivisions into which petitioner's argument is divided, using substantially the same headings used by petitioner.

(a) The Usual Rule, Requiring Proof of Some Specific Arbitrary Method, Should Be Held Applicable to the Facts in This Case.

There is no good reason why this rule should be abandoned in this case. If petitioner's only cause for complaint is that the value was computed by fundamentally erroneous principles, surely the proof should be clear and satisfactory, and the burden should rest upon the petitioner, not upon

respondents. The actions of the State Board are clothed with the wise presumption of legality and regularity. If petitioner can prove the *fact* of the calculation of value by the use of fundamentally erroneous principles, some of the authorities appear to support the proposition that this, in itself, vitiates the assessment. But the fact must be proved. The railroad here has not proved this fact. It has simply drawn some rather far-fetched conclusions. The Circuit Court below demonstrates the fallacy of petitioner's petition very clearly by its language beginning with the last paragraph on page 313 of the Record.

If this fact cannot be proved by the railroad, that does not necessarily deprive it of any defense against a wrongful assessment. If the assessing board failed to follow some legislative mandate, if it was guilty of fraud, actual or constructive, or if there has been a systematic course of intentional discrimination, the railroad may prove the same and avoid the tax. Surely the time has not come when taxpayers may simply complain of over-assessment, and thus place upon the shoulders of the assessing authorities the burden of proving each step it followed in the process of arriving at the assessment, and the correctness of the result thereof.

(b) THERE WAS NO ARBITRARY ACTION IGNORING DEPRESSION ECONOMICS.

Petitioner takes the position that because the valuation of the Great Northern was not reduced in 1933, the Board must have failed to consider depression economics. No such result necessarily follows. A consideration of depression economics, the antics of the stock market, the unreliability of all standard tests of value of all things, and of the probable benefits of the New Deal just under way at the assessment

date, together with the fact that a minor boom was just under way in the summer of 1933, might very well have been the Board's reason for *not* reducing the assessed value of the railroad in accordance with the reduction indicated by the results of arbitrary formulae based on depression statistics, ending on December 31, 1932.

Clearly the case of *A., T. & S. F. Ry. Co. vs. U. S.*, 284 U. S. 248, cited by petitioner, is not in point. In that case the rates in question were based on evidence received by the Interstate Commerce Commission at a hearing concluded in 1928. The rates were fixed in 1930, and, before they became effective, the railroad in 1930 and again in 1931 petitioned for a re-hearing, to permit it to be heard in support of contentions that the depression commencing in 1929 had completely altered the situation. The Commission denied the application, and the Court, very properly, held this to be an abuse of discretion.

In the instant case, however, the hearing was had and the property assessed by the Board in 1933. The railroad was afforded an opportunity to appear, and did appear and present its case. True, its evidence on the question of the effect of the depression is negligible, except for a brief recital of financial and operating statistics of the railroad, but it had the opportunity to present as much evidence as it desired (Ex. Z-2, R. 295).

The assessment was made after this hearing, and the presumption is that the Board took all these matters into consideration.

(c) THE ACTUAL USE BY THE STATE OF THE MILEAGE PRORATES AS A METHOD OF ALLOCATION WAS NOT SUFFICIENTLY PROVEN.

Petitioner's difficulty in distinguishing between Mr. Baker, the State's witness, and the State Board of Equalization is again apparent in its argument under this heading. Mr. Baker was never a member of the State Board. He was not even connected with the Tax Commissioner's office at the time the assessment was made, and he knew nothing whatever about the 1933 assessment, having had nothing to do with it. True, for 13 years, ending six months before the 1933 assessment was made, he had been deputy Tax Commissioner, and he had attended the meetings of the State Board during those years. His testimony concerned two phases of the issues involved. First, he testified as to the *fact* that he, as Deputy Tax Commissioner, had, during the years prior to 1933, prepared tables and exhibits for the assistance of the State Board, in the same manner as was done by the railroad experts, and that the Board considered his computations and those submitted by the railroads, and then, from this evidence and all matters of common knowledge and other evidence before it, the Board used its judgment, which never followed the exact result of any of the computations. Second, he testified as an expert witness as to his personal *opinion* of the merits and demerits of all the standard formulae used by experts to compute railroad values, and in this connection he presented numerous exhibits demonstrating the various results produced by the various methods of calculation used.

True, in his testimony, Mr. Baker did advocate and defend the use of a composite factor of allocation, based upon the average of five factors in common use, to-wit: Gross

earnings, ton and passenger miles; car and locomotive miles; all track mileage; and I. C. C. valuation. Only one of these —all track mileage—is what is commonly known as a "mileage factor"; the gross earnings, ton and passenger mileage, and car and locomotive mileage factors are known as "use factors."

Mr. Baker's use of any of these factors, or his advocacy thereof, does not constitute any evidence of their use by the Board.

(d) PETITIONER SHOULD BE REQUIRED TO NEGATIVE THE USE OF PROPER METHODS OF DETERMINING VALUE.

The presumption is that the State Board acted lawfully. The burden is on the plaintiff to show it acted otherwise. Since an injunction against the collection of taxes is a direct interference with the most important function of State Government, the proof should be extraordinarily clear and convincing.

> "It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be a clear and affirmative showing that the difference is an intentional discrimination and one adopted as a practice."
>
> *Chicago, G. W. R. Co. vs. Kendall,* 266 U. S. 94.
>
> See also: *Southern Ry. Co. vs. Watts,* 260 U. S. 519.

The proof that the 1933 assessment is the same as the 1932 assessment and that the 1932 assessment comes within 4.29% of the result which would have been arrived at had the formula to which plaintiff objects been used (Ex. P, Schedule 4), is not by any means clear and convincing

evidence that the Board did not honestly and fairly consider all the evidence and all available information, and render a reasonable judgment upon the facts before it—which is all that the law requires.

The case of *Pennsylvania R. R. Co. vs. Jacoby & Co.*, 242 U. S. 89, cited by petitioner, is not at all in conflict with the decision of the lower courts here. In that case the Court held that where the Interstate Commerce Commission reached a conclusion which exactly conformed to the results which would be obtained by using certain unlawful percentages, the question of whether or not such unlawful method was actually used should have been submitted to the jury.

In the instant case, the trial judge was the trier of both law and fact. The issue of fact as to whether or not an unlawful formula was used in the calculations of the Board was directly submitted by the pleadings and the evidence. The trial court decided that question of fact adversely to plaintiff's contentions (Findings No. 6 and No. 9, R. 52). These findings are approved by the decision of the Circuit Court of Appeals, and are clearly in conformity to the evidence.

Plaintiff contends that because of the ruling in *C., B. & Q. R. R. Co. vs. Babcock*, 204 U. S. 585, at page 593, the rule requiring plaintiff to prove his case should be relaxed. The statement in that case goes no further than to announce the proposition that members of the State Board should not be cross examined as to "the operation of their minds." There is nothing in this decision which would prohibit inquiry by the railroad of a member of the Board as to whether or not any specific formula was used.

Petitioner's contention in this connection is that since plaintiff cannot call members of the State Board and cross

examine them as to the operation of their minds, the presumption should be that their minds have operated wrongfully, and the burden should be thrown upon them of voluntarily testifying and justifying the results of their mental operations on the question. The rule announced by Mr. Justice Holmes is for the protection of state officers, not for the purpose of shifting the burden of proof and making it incumbent on the state to prove the legality of an assessment, as shown by the following language:

> "All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final notwithstanding mistakes of fact or law."

(e) Lawfulness of "Mileage Prorates."

We will not burden the Court with an extended discussion of this feature of the case. The so-called "mileage prorates" are not proven to have been used. If they were used, they are not unlawful, particularly under the facts in this case. The identical factors of allocation here criticized were approved by the railroad at the hearing before the State Board and were used in its computations of value then presented to the State Board (Ex. Z-2, R. 295, 301).

We know of no case, and petitioner has cited none, in which a combination of factors such as was used by the witness Baker in his computations has been disapproved. They are substantially the same factors as were used in the case of *Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102. In the Rowley case the disproportion between the track mile-

age factor and the average of the use factors was much greater than here. There, Wyoming's percentage of the system on the basis of traffic units was 1.58%, on the basis of the use of rolling stock, 1.65%, and on the basis of average gross and net operating revenues, 1.89%. The average of these three use factors was 1.79%. Wyoming's main track mileage was 3.29% of the system. Yet the Court, while disapproving the mileage factor as the sole test, approved the action of the State Board in averaging traffic units, use of rolling stock, average gross and net operating revenues, and main track mileage, making a final percentage of 2.10%.

Thus, these factors were permitted in the Rowley case when the main track mileage factor was 192% of the average of the three use factors.

In the instant case the average of the use factors used is 19.14%, while the all-track mileage is 19.97%—making the mileage factor 104% of the average of the use factors (Ex. N, R. 273).

If the 92% spread in the Rowley case was insufficient to require the elimination of the mileage factor, we cannot believe that the 4% spread in the instant case justifies petitioner's contention.

V. CONCLUSION.

We respectfully submit that the decision in the Courts below is strictly in accord with the previous decisions of this Court; that the contentions of petitioner are based solely upon disputed questions of fact decided against petitioner by the trier of the facts with ample support in the evidence; that no new question of interest or importance will be settled by a decision of this Court in the instant

case; and that the State of North Dakota should now be permitted to collect its 1933 taxes without further delay.

Dated this 26th day of July, 1935.

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Solicitors for Respondents.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 178

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE AS AUDITOR AND L. T. HALVORSON AS TREASURER OF BARNES COUNTY, ET AL., ALL OF THE STATE OF NORTH DAKOTA,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

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Petitioner,

vs.

J. J. WEEKS, STATE TAX COMMISSIONER; J. M. BAILLIE as Auditor and L. T. Halvorson as Treasurer of Barnes County; G. A. Gilbertson as Auditor, W. D. Conway as Treasurer and Bert M. Salisbury as Auditor-elect of Benson County; Ole Colbornson as Auditor, Sam H. Wilson as Treasurer, C. E. Hurst as Auditor-elect and Arlan Stair as Treasurer-elect of Bottineau County; H. F. Magedanz as Auditor, Jerry Donovan as Treasurer and Thomas P. Borgen as Treasurer-elect of Burke County; F. Ford Doherty as Auditor, C. A. Baumgartner as Treasurer and Paul H. Eddy as Treasurer-elect of Cass County; Otto Rasmusson as Auditor and A. A. Wilson as Treasurer of Cavalier County; John A. Dawe as Auditor, H. J. Oberman as Treasurer and Harry Bjornstad as Treasurer-elect of Dickey County; R. H. Lynch as Auditor, O. A. Steffler as Treasurer, Myrtle Skabo as Auditor-elect and Albert T. Heide as Treasurer-elect of Divide County; S. W. Lyman as Auditor, Hugh Peoples as Treasurer and S. K. Haugland as Auditor-elect of Eddy County; J. B. McWethy as Auditor, M. P. Roberts as Treasurer and Alice Cole as Treasurer-elect of Foster County; Martin O. Haugen as Auditor, John Sandbek as Treasurer and Albert Brenna

as Treasurer-elect of Grand Forks County; P. A. Melgard as Auditor, R. J. Howden as Treasurer, R. J. Howden as Auditor-elect and H. B. Nelson as Treasurer-elect of Griggs County; E. W. Olson as Auditor and Oscar R. Fisher as Treasurer of McHenry County; Arne Tollefson as Auditor, Oluf Erickson as Treasurer and O. M. Fritsvold as Treasurer-elect of McKenzie County; F. J. Haines as Auditor, Nels Hofland as Treasurer, M. L. Glarum as Auditor-elect and Sadie Hofland as Treasurer-elect of Mountrail County; Peter Jorgenson as Auditor and J. J. Schindele as Treasurer of Nelson County; Wm. W. Felson as Auditor, J. H. Hannesson as Treasurer and Norval W. Hodgson as Treasurer-elect of Pembina County; O. A. Spillum as Auditor and O. T. Tofsrud as Treasurer of Pierce County; J. O. Peterson as Auditor and F. J. Burckhard as Treasurer of Ramsey County; C. E. Colcord as Auditor, W. C. Budke as Treasurer, W. E. Coutts as Auditor-elect and Einar Johnson as Treasurer-elect of Renville County; George J. Fischer as Auditor, Karl L. Mikkelson as Treasurer and Einar Vohnson as Treasurer-elect of Richland County; Jas. H. Penny as Auditor, Allister McKay as Treasurer and E. M. Anderson as Treasurer-elect of Rolette County; R. W. Safstrom as Auditor and H. O. Webster as Treasurer of Sargent County; G. J. Mustad as Auditor, Florence Carlson as Treasurer and Ella B. Johnson as Treasurer-elect of Steele County; A. T. Mooney as Auditor and John Gang as Treasurer of Towner County; Gerhard D. Olson as Auditor and Thomas P. Strand as Treasurer of Traill County; W. J. LaMarre as Auditor and Benj. A. Gudajtes as Treasurer of Walsh County; A. G. Torgerson, as Auditor and Bert A. Balerud as Treasurer of Ward County; Otto G. Krueger as Auditor and Edith Darcy as Treasurer of Wells County; Morten Mor-

tenson as Auditor and Oscar N. Lee as Treasurer of Williams County, all of the State of North Dakota,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS.

STATEMENT OF THE CASE.

The Statement of the Case set forth in the brief of the petitioner is, perhaps, sufficient to inform the Court as to the contentions of the appellant, but since it makes no pretense of setting forth the general nature of the case and the broad issues involved, it seems necessary for us to present such a statement in this brief.

The action involves the 1933 taxes of the Great Northern Railway in the State of North Dakota. The Great Northern Railway appeared before the State Board of Equalization meeting and asked that its 1933 assessment be fixed at an amount not in excess of $60,000,000 (Dft's. Ex. Z-2, R. 295, 300). The State Board fixed the assessment at $78,832,888. The total tax levy upon this assessment was $1,508,352.34.

Petitioner now contends that the assessment exceeds the true value by 43%, but has paid 60% of the taxes levied, and a temporary injunction was issued against the enforcement of the remaining 40%, upon the payment of the 60% admittedly due. This payment was upon the basis of an assessed value of approximately $47,000,000, some $13,000,000 less than the valuation asked of the State Board. Reduced to taxes, it represents a payment of nearly $300,000 less than would have been paid upon the basis of the $60,000,000 assessment requested by the petitioner when it

appeared before the State Board.

The action was dismissed in the trial court, but the temporary injunction has been continued in force pending the appeal to the Circuit Court of Appeals and the application for a writ of certiorari to this Court.

The evidence submitted by the petitioner at the trial consisted of expert testimony calculated to establish the proposition that the assessment was in excess of the true value of the North Dakota by 43% or more. Such evidence was based entirely upon calculations and formulae never before used in tax cases, and upon evidence which had not been submitted to the State Board (R. 85). They were prepared by Mr. Turnburke, a man who has never appeared before a tax commission, does not know who has appeared for his railroad, and does not know what basis was used for arriving at valuations by those who did appear for the railroad (R. 129). Though Mr. Schoettler, petitioner's assistant right of way, land and tax commissioner, the railroad's representative at the hearing before the State Board, was called as a witness by the railroad, he did not give one word of testimony in support of the formula developed by Mr. Turnburke, but his testimony was closely confined to other matters (R. 79). The figures contended for by Mr. Turnburke were not prepared until long after the meeting of the State Board, and were not presented to the State Board of North Dakota or any other state (R. 129).

The evidence submitted by the respondents was limited to the expert testimony of the witness Baker, based upon the financial and operating statistics of the railroad (R. 183, 291). His testimony disclosed that the State Board of Equalization of the State of North Dakota is required by law to exercise its judgment as to values, and is not permitted to substitute arbitrary formulae for that judgment;

that the state tax commissioner and the railroad tax officials have always prepared computations for the assistance of the State Board, which computations have been based upon widely varying formulae, which have produced widely varying results; that the State Board has considered all the evidence before it and then exercised its judgment as to the true value. It has never adopted any formula for the determination of railroad values, but has always exercised its judgment as required by law. Mr. Baker also discussed at length the various theories used by experts in determining railroad valuations, and his testimony establishes the proposition (concurred in by Mr. Schoettler, the railroad's tax expert, at page 86 of the record) that the assessment of railroad property is not an exact science, that there is no uniformity in methods for determining railroad values, and that all formulae are unreliable. Defendant's detailed exhibits, particularly Exhibits P, Q. R. S and T (R. 277-279, 281-283-285) disclose the results of the application of the various formulae in common use to the statistics of the Great Northern Railway.

The members of the State Board were not called as witnesses by either party, and there is no evidence as to what figures, facts or formulae were considered by the Board at its meeting at which the assessment in question was fixed, save and except that the brief presented to the Board by the Great Northern is in evidence, and this brief discloses that the railroad then contended for an allocation of the system value to the State of North Dakota by the use of the very allocation factors which it most bitterly assails in this action (Ex. Z-2, R. 295).

Upon consideration of the evidence the trial court found the facts to be as contended by the State; that the assessments for the years 1929, 1930, 1931 and 1932 were each

and all lawful and justified, and that there was no evidence (other than certain evidence offered to show that the assessment was in excess of actual value) that the 1933 assessment was fraudulent or made with intent to defraud the plaintiff, or that it was made by any unlawful or improper method or in violation of any legislative mandate (Findings of Fact, R. 51, 52).

The trial court made no finding as to the true value, or as to whether or not the assessment was excessive, for the reason that no fraud, actual or constructive, having been shown, the Court felt it was unnecessary and improper for it to attempt to fix the true valuation, that being the function of the State Board of Equalization.

Petitioner's Statement of the Case is limited to a statement of its conclusions as to the result of some specific phases of the evidence, which it appears necessary to explain. We will explain briefly.

(a) Excessiveness of the Assessment Not Admitted.

Respondents do not, and never have, admitted that the assessment is excessive. The Answer first sets forth in paragraph E (R. 24) that the statutes of the State do not permit the use of mathematical calculations for determining railroad values, and that though some of the formulae used by experts do, in normal times, have some evidentiary value, under present conditions these formulae have lost much of their value, and that the State Board has never adopted any formula. Then, in paragraph I (R. 28) in answer to complainant's contention that the physical property factor of allocation is the only reasonable basis for distribution of the system value among the states, the State alleges on the contrary that the best and most accurate sys-

tem involves the use of all five factors, rather than any one or other number less than five. But the allegation does not by any means admit that the use of the five factors of allocation will produce a mathematically exact solution to the question of the value of the railroad. In fact, even if it did constitute such an admission, the allocation of the system value is only one step in the calculations of the experts—the most important step, the valuation of the entire system, is not involved at all. And the so-called "admission" or "confession" of Mr. Baker is simply this answer, given on cross examination: "I believe it is correct that schedule 4 on Exhibit P showing the five factor ratio is the one which is advocated by the state as the fairest basis *of allocation*" (R. 189).

Mr. Baker also testified (R. 206), "As to my statement that the excess in the 1933 assessment over the results produced by any of these tables operated to some extent to condemn the 1933 assessment, I will say that the very best statistical evidences of value are not definite proof of value and there were a number of peculiar and extraordinary circumstances for the Board to consider in 1933 that are not in any way indicated by statistical exhibits. I do not feel that variance from the results produced by my tables present an absolute showing of a wrongful assessment on the part of the State Board."

Thus is reduced to an absurdity any contention that the State has admitted an over-assessment of 24.52%. We frankly admitted that the *formulae* used by tax experts would not justify the assessment; but the whole record made by the State, both in the pleadings and the evidence, constitutes a direct and categorical denial that the results of these formulae furnish any reliable test as to the accuracy of the assessment.

(b) No Factors in the 1932 Assessment Making Its Adoption for 1933 Unlawful.

Petitioner's statement upon this point would make it appear that there is some evidence in the record that the Board used a five year period for the determination of earnings and stock and bond values both in 1932 and 1933. As a matter of fact, and this cannot be too strongly urged, there is not one word of evidence in the entire record as to the use of any period, any method, or any formula. The petitioner alleges the Board used various combinations of figures; the Answer denies the use thereof, and says the Board simply considered all evidence, computations and matters of common knowledge before it, and then used its judgment. Not one word of evidence is submitted by the petitioner to show what the Board used, either in the matter of the period over which the stock and bond values or earnings should be averaged, or the factors used in allocating system value to the State. The burden of proof was on the petitioner, and it did not see fit even to attempt to sustain that burden.

In petitioner's statement, much is made of the prophecies of Mr. Beidelman and Mr. Turnburke as to the dark future of the railroad. These prophecies were not submitted to the State Board, and the State Board was never given the opportunity of considering whether or not the assessment should be reduced by reason thereof. See Exhibit Z-2, R. 295, which is the only evidence or contention made by the railroad before the State Board.

(c) No Proof That Mileage Prorates Were Actually Used in Making the Assessment.

Petitioner contends that the Answer does not deny and therefore admits that mileage prorates were used in allocating system value to North Dakota. It is true that the defendants did not deny paragraph IX of the Complaint as fully as might have been done, but the Answer does fully and completely deny that *any* formula was used by the Board, and alleges that any use thereof by the Board as the final and conclusive determinator of value would have been in violation of the statutory duties of the Board. See, particularly, paragraph E of the Answer (R. 24). This contention is completely answered by the opinion of the Circuit Court of Appeals at page 312 of the record, that we will give it no further notice.

As to proof, Exhibit P, Schedule 4 (R. 277), shows that the use of the criticised method of allocation of system value would not in *any* year have produced the assessment complained of, as the assessment was 5.41% higher than the computed value in 1929; .18% lower than the computed value in 1930; .41% higher than the computed value in 1931; 4.29% higher than the computed value in 1932; and 24.52% higher than the computed value in 1933. When the use of a system or formula produces variations from the assessment of 5.41%, .18%, .41%, 4.29% and 24.52% in as many years, it quite clearly appears that the formula was not used in making the assessment. The contention is well answered by the Circuit Court of Appeals thus: "* * * it is clear that the proof of the *fact* that the Board used the above five factor method is based on the *conclusions* that because the Board's assessments for several years before 1938 were not far from what would have resulted by

the use of that method, and because the assessment of 1933 was the same as for 1932, it must follow that such method was carried into the 1933 assessment. But the 1933 assessment is appreciably above the result which would have been reached by applying such method. No member of the Board was a witness. No witness pretended to know all that the Board might have considered. * * * We think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method and, therefore, is in no position to urge the contention that property outside the State has been brought into this assessment" (R. 313).

Petitioner has great difficulty in distinguishing between the State Tax Commissioner and the State Board of Equalization; and the same difficulty in distinguishing the testimony of the witness Baker as to his opinion concerning the proper factors for consideration, from evidence as to what the Board actually considered. The record is clear that the Tax Commissioner made computations for the assistance of the Board, but the Board never adopted these computations. It considered them and the computations presented by the railroad and all other matters before it, and then used its honest judgment.

(d) Facts Which Justify Assessment in Excess of the Results of Formulae.

The effect of the depression upon the reliability of statistical formulae is not mentioned in petitioner's brief. Stock and bond prices during the years in question were a matter of panic psychology, not of sound judgment of investors as to values. As an illustration, the Dow-Jones & Company averages of thirty industrial stocks fell from 383.17 in Sep-

tember, 1929, to a low of 41.22 in July, 1932, and the average of twenty rails fell from 189.11 in September, 1929, to 13.23 in July, 1932. The total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and a half billion dollars in September, 1929, to fifteen and a half billion dollars in July, 1932 (R. 147). These figures indicate the utter unreliability of market price of stocks and bonds as an indicator of actual value of the underlying property.

With reference to the Great Northern stock, Exhibit C (R. 253) gives a complete picture of the history of Great Northern stock for the 17-year period prior to the assessment date. The 17-year period is used, for the reason that it is the period within which the stock would have earned $100.00, had its annual return been 6%. The exhibit shows the stock actually earned $131.39 in these seventeen years, and actually paid $92.25 in dividends. The corporate surplus increased from $106,000,000 to $149,000,000 in 1933. In the five years preceding the assessment year the stock had earned $10.11 in 1928, $10.31 in 1929, $7.25 in 1930, $2.14 in 1931, and nothing in 1932. During the same five years, dividends of $5.00, $5.00, $7.50, $2.50 and nothing had been declared. Thus in the preceding five years stockholders had received actual cash dividends of $20.00—yet the average market price for 1932 was only $13.20. This Exhibit C, together with the explanation thereof at page 157 of the record, is convincing evidence that the results of any formula based in any part upon stock prices were not to be trusted in 1933.

During the months of May, June and July, 1933, immediately preceding the assessment, we were in the middle of a boom, and there had been a tremendous upward trend in the stock and bond market. There was a very sharp rise in

Great Northern stock at that time (R. 207).

The assessment of general property in North Dakota has not been reduced in conformity with the drastically decreased economic return from property, and could not be so reduced without so drastic a reduction in revenues as to endanger the continuance of the functions of government. The mere fact that the securities representing a certain class of taxable property are quoted on the market, and its earnings are readily available should not entitle that class of property to preferential treatment. Farm property constitutes about 65% of the total taxable value in North Dakota. The economic return from such property has decreased about 75% as compared with the 1924-1928 average. There has been no net return on the investment (R. 149).

In 1932, the last year prior to the assessment date, the North Dakota mileage of the Great Northern carried 378,498 revenue ton miles of freight per mile of track operated, while the entire system carried only 358,909 revenue ton miles of freight per mile of track operated, which, reduced to percentages, shows that the North Dakota mileage carried 105.46% of the system average (Exhibit J).

The average net operating revenue per mile of track for the eight years preceding the assessment date was $3,013 for North Dakota, and but $2,816 for the system. The operating ratio, that is, the ratio of operating expenses to operating revenues, was 62.44% for North Dakota, and 67.71% for the system (Exhibit L).

Since 1918, when the valuation of the Great Northern was fixed by the United States District Court, there have been the following changes in the assessed value of the Great Northern: 1919, 4.08% reduction; 1922, 5% reduction; 1929, 1.25% increase; 1931, 0.35% reduction; 1932, 5% reduction; 1933, 0.02% reduction. Since the 1917 assess-

ment the total reduction in assessed value has been $19,661,884, or 19.96%. Since the 1919 assessment the total reduction has been $7,770,442, or 8.97% (Exhibit O).

Other material facts will be developed in the course of the argument.

ARGUMENT.

I. Introduction and Brief Reply to Points Relied Upon by Petitioner.

We regret that it is impossible for us to follow the outline used in petitioner's brief in presenting our case, for the reason that the petitioner has devoted itself so largely to a discussion of evidence not before the Board of Equalization and a formula for allocation of system value to States which is new and untried and unvouched for by any Court or tax authority, that the picture is entirely out of focus.

We apprehend that in a case such as this, the question at issue is whether or not the assessment made, viewed as a whole, is in an amount which reasonable men, acting honestly in the performance of their official duties, in view of the evidence before them and all matters within their common knowledge, might have concluded to be the actual market value of North Dakota's share of this interstate railroad.

Little or no attention is directed to this fundamental question in petitioner's brief, but extended attention is given to such questions as whether or not the 1933 assessment was the same as that in 1932; whether or not the use of five years' earnings and stock and bond prices to determine system value was admitted in the pleadings or proven in the evidence; whether or not the use of mileage prorates was admitted or proven, and similar questions. The funda-

mental questions—whether or not the Board failed to follow the statutory mandate as to the method of assessment, and whether or not the Board was guilty of fraud, actual or constructive—are largely ignored.

However, in order that the Court may be advised of our answer to the specific points raised by petitioner, we submit the following brief answers to the several points in petitioner's brief:

"Point A. The adoption of a prior year's assessment for 1933, the use of five years' earnings and stock and bond prices to determine system value and the apportionment of system value to North Dakota by the use of mileage prorates were not only proven but were specifically admitted by the pleadings." We flatly deny that the pleadings or the evidence establish that the Board used the five years' earnings period and stock and bond prices to determine system value, or that the Board apportioned the system value to North Dakota by the use of mileage prorates. The evidence and the pleadings are analyzed in connection with this point at page 6 of this brief. The opinion of the Circuit Court of Appeals squarely answers this contention of petitioner (R. 312).

"Point A-1. The precise amount of the 1933 assessment was fixed by that of the 1932 assessment, which was adopted for 1933." We admit that the precise amount of the 1933 assessment was the same as that fixed in 1932, after subtracting a small amount for trackage removed.

"Point A-2. The amount of the 1932 assessment as originally made and, therefore, as adopted in 1933, was determined from earnings and stock and bond prices of the years 1927 to 1931 and by the use of mileage prorates of system value." We deny that the evidence or the pleadings show that the amount of the 1932 assessment as originally made

was determined from earnings and stock and bond prices for the years 1927 to 1931, and by the use of mileage prorates of system value. Petitioner has not pointed out one word in either the pleadings or the evidence which shows what method was used by the Board in determining the assessment either in 1932 or 1933. No witness testified as to what was the basis for the Board's conclusion. The evidence referred to at page 10 of this brief discloses that the use of the criticised formula for determining value would not have produced the amount of the assessment in any year of the five years covered by the exhibits.

"Point B. In basing the assessment upon earnings and stock and bond prices of 1927 to 1931, the Board was in effect assessing values of an obsolete period which were no longer in existence in 1933." This point assumes that the assessment was based upon earnings and stock and bond prices for 1927 to 1931, and then charges that the effect thereof was to assess values of an obsolete period. Aside from the fact that there is no evidence that this assumption is justified, the five-year averages had always been used in the past, and were never objected to by the railroad until the bottom of the depression was reached. Stock and bond prices of the three years immediately preceding the assessment date were no evidence whatever of value, being based purely upon panic psychology. Prices immediately preceding the fall of 1929 were likewise unreliable, being based upon boom psychology. The only way an air of respectability can be given at all to stock and bond prices is to average them over a sufficient period of years to iron out the depressions and the booms.

"Point C. Of the total amount of the assessment, approximately $20,000,000 was levied against properties outside of the State and beyond its jurisdiction." This argu-

ment proceeds upon the theory that the value of a going railroad should be allocated among the States solely upon the basis of physical property values. This has never been the law with reference to the allocation of system value of a railroad. Much testimony was given concerning the weight of rails in North Dakota and elsewhere on the system, the number of bridges within and without the State, the terminals within and without the State, etc. But none of this evidence was before the State Board. Neither was the novel method of allocation suggested by Mr. Turnburke before the Board. The only thing shown to have been before the State Board, astonishingly enough, is a brief of the railroad, wherein the allocation of system value to North Dakota is accomplished by the very method so hotly criticised in petitioner's brief. Petitioner's tax department, in briefing its case for the State Board, did not even use the physical property factor as one of several possible factors of allocation—it completely ignored the contention which is now made. See Exhibit Z-2 at R. 298.

"Point C-1. The North Dakota trackage consists largely of relatively cheap branch lines. The more valuable terminals and more costly mountain construction are located outside the State." The evidence relied upon to establish this proposition was not before the State Board, and it had no opportunity whatever to consider the same.

"Point C-2. The outside terminals and costly mountain construction, while concentrated in short mileage, contribute as much to transportation service and to system value in proportion to cost and value of plant as do the cheaper portions of the road where the same investment is spread over more miles." The evidence relied upon to establish this proposition was not before the State Board, and it had no opportunity whatever to consider the same.

"Point C-3. The right to assess and tax each portion of a railway system belongs solely to the State where that portion is located." The truth of this proposition is granted, if coupled with the statement that terminal values and mountain construction actually located in other States do enhance the value of property in other States of the same railroad system, and that the same must be taken into consideration in valuing any part of the system.

"Point D. Where the use of unlawful methods by the taxing officers has been shown, it is not incumbent upon the taxpayer to submit a proper method of computation or to prove the correct amount that is due." We insist that no evidence shows the use of *any* particular method by the State Board, and that even if the use of an improper method were shown, it would also be incumbent upon the railroad to show that the use of such a method actually resulted in fraudulent over-assessment.

"Point E. Even assuming that no wrongful methods were shown and that there was no evidence whatever as to what methods were used, the facts that the assessment is treble the current value of the property and that the defendants confess their inability to justify it by any rational process are sufficient to prove arbitrary action." Of course, the contention that the assessment is treble the current value of the property is based wholly upon facts not before the Board, and conclusions of a rate expert (not a tax expert) which were prepared solely for use in this case, after the assessment was made, and which had never before been heard of anywhere. The railroad's brief before the Tax Commission asked for an assessment "not in excess of $60,000,000" (R. 300). Tables submitted by the railroad and before the Board produced valuations as high as $64,814,280 (R. 301). The assessment was $78,832,888. The defendants did not

"confess" inability to justify the assessment by any rational process. True, the defendant's expert witness did admit frankly that he knew of no *formula* which would produce the amount of the assessment. But the Board was not at liberty, under the statute, to substitute any formula for its honest judgment. The evidence does disclose that any and all customary statistical formulae were wholly unreliable as indicators of value during such times as existed in 1933. There was ample support in the evidence and in the Board's common knowledge of the condition of the times for the judgment announced by the Board.

"Point F. The economic emergency does not justify the violation of the statute requiring the assessment of property at its full and true value in money." We do not deny this proposition, but we do insist that the economic emergency has thrown all tests of value out of gear, and that a board should not be charged with fraudulent over-assessment when it refused, in such circumstances, to give full credence to depression stock market reports, etc., as absolute tests of market value, and we do insist that the Board should be given a little more latitude for errors in judgment at times like these, when anyone's judgment of the value of anything is little more than guess-work, than during normal times.

Most of the above brief answers to petitioner's "Points Relied Upon" will be elaborated in the course of the discussion which follows, in which we will attempt to analyze the assessment as a whole in the light of the law and the evidence.

II. Points Relied Upon by Respondent.

A. Federal Courts Should Interfere With Administration of State Taxing Power Only in Extreme and Aggravated Cases.

B. Federal Courts Will Enjoin Collection of State Taxes Only When Assessed in Violation of Legislative Mandate, or When Computed by Erroneous Principles Resulting in Gross Over-Assessment or Taxation of Out-of-State Property, or When the Assessing Board Is Guilty of Fraud, Actual or Constructive.

C. The Board Did Not Fail to Follow Any Legislative Mandate.

D. The Assessment Was Not Computed by Any Erroneous Principle Resulting in Over-Assessment or Taxation of Out-of-State Property.

1. The finding of the trial court that there is no evidence of the use of a wrongful method by the Board should not be disturbed.

2. Even assuming the method criticised by petitioner was used by the State Board, it is not an improper method.

   (a) The use of a five year period for determining stock and bond values and for averaging capitalized net earnings is not unreasonable.

   (b) The use of the five-factor method of allocation of system value does not result in the taxation of out-of-state property.

   (c) The facts upon which petitioner relies to show

unfairness in the criticised method were not before the State Board, and the railroad, itself, actually used the criticised method before the State Board.

E. THE ASSESSING BOARD WAS NOT GUILTY OF FRAUD, EITHER ACTUAL OR CONSTRUCTIVE.

1. It is admitted that there was no actual fraud.

2. The Board was not guilty of constructive fraud.

(a) The 1933 assessment was not grossly excessive.

(1) The Turnburke theory as to the proper basis for taxable value is not sound.

(2) Assessment of interstate railroads is not an exact science, and all formulae are mere approximations of actual value.

(3) Use of the standard methods of allocation of system value to the State of North Dakota produces results approximating true value.

(4) The State Board was justified in leaving the 1932 assessment unchanged in 1933.

(5) Assuming the 1933 assessment to have been erroneous in amount, the error is not one which the Court should attempt to correct.

(6) Even if there was an over-assessment for 1933, it was not part of a continued practice of over-assessment.

F. PLAINTIFF HAS FAILED TO DO EQUITY.

A. FEDERAL COURTS SHOULD INTERFERE WITH ADMINISTRATION OF STATE TAXING POWER ONLY IN EXTREME AND AGGRAVATED CASES.

In this case the Court is asked to interfere with the exercise of the taxing power of a sovereign state, probably the most important power held by the State. Even in normal times, the Courts are extremely reluctant to place a restraining hand upon the administrative branch of the State charged with the exercise of this essential function of government.

> "It is not enough, in these cases, that the taxing officials have merely made a mistake. It is not enough that the court, if its judgment were properly invoked, would reach a different conclusion as to the taxes imposed. There must be a clear and affirmative showing that the difference is an intentional discrimination and one adopted as a practice."
>
> *Chicago, G. W. R. Co. vs. Kendall*, 266 U. S. 94.

> "The board was created for the purpose of using its judgment and its knowledge. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *State vs. Savage*, 65 Neb. 714, 768; *In re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co. vs. January*, 57 Cal. 614, 616. Within its jurisdiction, except, as we have said, in case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."
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> *Chicago, B. & Q. R. Co. vs. Babcock*, 204 U. S. 585.

> "At the most there have been errors of judgment;

and mere errors of judgment are not subject to review in these proceedings. *Pittsburg, C. C. & St. L. R. Co. vs. Backus,* 154 U. S. 421, 38 L. Ed. 1031, 14 Sup. Ct. Rep. 1114; *New York ex rel. Brooklyn City R. Co. vs. New York,* 199 U. S. 48, 52, 50 L. Ed. 79, 85, 25 Sup. Ct. Rep. 713."

Southern R. Co. vs. Watts, 260 U. S. 519.

"The power of assessment, vital though it be, must be lodged somewhere. In Kansas, and generally, it is lodged in the administrative branch of the government, and not the judicial. Mistakes will be made, whether the valuation be made by a Commission, a jury, or a court. Courts therefore do not supervise the actions of assessing bodies, nor sit to correct their errors of judgment. Where the assessing body has failed to follow a legislative mandate, or where it has pursued a systematic course of intentional discrimination, or has been guilty of fraud, or arrived at value by the use of fundamentally erroneous principles, recourse may be had to the courts. But proof of mistake or inequality is not enough."

Pleasant vs. Missouri-Kansas-Texas R. Co. (C. C. A.), 66 F. (2d) 842, 845.

This being true in normal times, how much more true it is in times like the present, when values which have been more or less stable for a generation have rapidly melted away, and when if all assessments had been reduced to conform to actual "market value" the State and its subdivisions would have ceased to function, as the revenue would not even approximate necessary expenses (R. 149). We think, even were this proposition not supported by the evidence, the Court would be justified in taking judicial notice of the

exigency of the times, and of the fact that actual "market values" have been wholly incapable of ascertainment with respect to any class of real property and much personal property, because there have been no markets to establish any such value; that if property other than railroad property were to be valued in times like these by a stock and bond method, or a capitalization of earnings method, there would be vast classes of property having both a past and a prospective value, but no present value at all; and that unless the State Boards charged with the great responsibility of assessing property are to be allowed some freedom and latitude in the exercise of their honest judgment, State governments must necessarily fall of their own weight, without revenue to support them.

By the foregoing we do not mean to say that every assessment, no matter how excessive or fraudulent, should be permitted to stand. We mean to say, rather that the Courts should not, in times like these, open up any new avenues of attack upon assessments, as requested by petitioner, but should, instead, require the strictest proof that the assessing board has transgressed beyond the limitations prescribed by the previous decisions of this Court. And if the record discloses that the State Board fixed a valuation in excess of that which would be produced by the application of some of the standards of value generally used in normal times, the Court should remember that there have been no true standards of value of anything—that any computation or the application of any formulas to any financial or operating statistics to any business has been wholly unreliable—and that all men have bought and sold upon the market, not with considered judgment of actual values, but upon guess-work, speculation, hopes and fears. The State Board members, acting under their oaths of office, met; they considered the

evidence and the arguments submitted to them by the railroad; and thereafter they made their assessment. The presumption is that they acted lawfully and properly. The trial court found:

> "that there is no evidence in this case (other than certain evidence offered to show that the assessment was in excess of actual value) that said assessment was fraudulent or made with intent to defraud the plaintiff or that it was made by any unlawful or improper method or in violation of any legislative mandate" (Finding No. 9, R. 52).

We submit that the mere fact that the State Board's estimate of value may not accord with the estimates of other reasonable men, or of a court, should not invalidate their assessment.

The remainder of this brief will be devoted to an analysis of the evidence and the law, for the purpose of demonstrating that this Finding and the Judgment of the Court based thereon, is correct.

B. FEDERAL COURTS WILL ENJOIN COLLECTION OF STATE TAXES ONLY WHEN ASSESSED IN VIOLATION OF LEGISLATIVE MANDATE, OR WHEN COMPUTED BY ERRONEOUS PRINCIPLES RESULTING IN GROSS OVER-ASSESSMENT OR TAXATION OF OUT-OF-STATE PROPERTY, OR WHEN THE ASSESSING BOARD IS GUILTY OF FRAUD, ACTUAL OR CONSTRUCTIVE.

This case does not involve the constitutionality of a state statute. The state statutes have not been challenged. The petitioner contends, rather, that in the administration of the state law, the State Board of Equalization has violated the state law and has unlawfully over-assessed petitioner.

Therefore, it seems necessary that petitioner should fit its case into one or more of the grounds recognized by the Courts as a basis for interference with the taxing power of the sovereign state. An analysis of the cases would indicate that these possible grounds are three in number: (a) Failure to follow a legislative mandate, (b) Computation of the assessment by erroneous principles resulting in gross over-assessment or taxation of out-of-state property, and (c) Fraud, actual or constructive, on the part of the Assessing Board.

Failure to follow a legislative mandate, of course, vitiates the assessment because it is the legislative mandate which creates the assessing board and defines its powers and its duties, and any substantial deviation from the path marked out by the legislature renders the assessment void.

Computation of the assessment by erroneous principles, in itself, apparently is not enough to justify interference. It must also be shown that such erroneous computation resulted in either a gross over-assessment, or in the taxation of property beyond the limits of the State. For instance, in *Cleveland, C. C. & St. L. R. Co. vs. Backus*, 154 U. S. 439, the allocation of system values upon a mileage prorate was approved. In *Pittsburg, C. C. & St. L. R. Co. vs. Backus*, 154 U. S. 421, it was held that testimony that the value placed upon the property of a railroad company by the Board of State Assessors was excessive, together with testimony that portions of the road outside of the State were of largely greater value than any similar length of road within the State, unaccompanied with evidence that the Board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the State is not sufficient to impeach its de-

termination. In *Wallace vs. Hines*, 253 U. S. 66, the use of the mileage prorate was held improper and unlawful. It is obvious that if the use of the mileage prorate is an improper method of allocating the system value of a railroad to the States, it is improper in all cases. But where it produces results substantially correct, the Courts do not interfere. Such interference is justified only when it is made to appear that the improper method actually operates to tax property not within the borders of the State, or to result in a gross over-assessment.

We feel that the burden of proof, therefore, is upon the plaintiff to establish both the use of an improper method and that such improper method produced an unlawful result. Not one word of testimony appears in the record as to what method was used by the Board, and we insist that in this case there could be no room for a conclusion that the assessment is invalid because of the use of an improper method.

Petitioner complains that the rule announced in *Chicago, B. & Q. Ry. vs. Babcock*, 204 U. S. 585, to the effect that members of the Assessing Board should not be cross examined as to the operation of their minds in making an assessment, makes it impossible for the railroad to prove its allegation of the use of improper methods. Of course, petitioner ascribes to that case a prohibition against any examination of the members of the Board as to what was before it and what was considered—something quite different from a cross examination as to the "operation of their minds"—but even if the prohibition should be extended to preclude the calling of the members of the Board as witnesses, we fail to see how this protection, rightly given to State officers acting in the performance of their duties, should be held to shift the burden of proof to the defendant, and make it the duty of

every Assessing Board to prove its assessment was based upon proper methods, instead of the burden of the plaintiff to prove the use of improper methods. This is directly the opposite of the rule laid down in *Sunday Lake Iron Co. vs. Wakefield Twp.*, 247 U. S. 350.

True, such an interpretation as petitioner places upon the Babcock case would make it difficult for an objecting taxpayer to show that an improper method was used, but that is, in itself, a mere technical objection. If the Board actually was guilty of a fraudulent over-assessment, plaintiff can prove that without the necessity of any evidence as to what method the Board used.

Fraudulent over-valuation vitiates the assessment, because it deprives the taxpayer of his equal protection under the laws, and obstructs the taxpayer in his business of transporting persons and property in interstate commerce, in derogation of the powers of Congress. The Courts have held that a fraudulent over-assessment may be shown either by proof of actual fraud, or by proof of an over-assessment so flagrant as to shock the conscience of the Court and leave no room for any other conclusion than that the Board was actuated by fraudulent motives, by proof of a systematic course of intentional discrimination over a period of years.

Bearing in mind that the good faith of tax officials and the validity of their actions are presumed, and when assailed, the burden of proof is upon the complaining party (*Sunday Lake Iron Co. vs. Wakefield Twp.*, 247 U. S. 350), we will consider the challenged assessment in the light of each of the accepted grounds for injunction in the Federal Courts.

C. The Board Did Not Fail to Follow Any Legislative Mandate.

The constitutional and statutory provisions fixing the powers and duties of the State Board of Equalization of North Dakota are set forth in the Appendix. No method of determining the amount of the assessment is fixed by the statutes. The Board is simply required to assess the property and franchise of the railroad at "its true and full value in money."

In the absence of any statute defining the method to be followed in determining the true and full value in money, we take it to be the law that the method to be followed and the details thereof will be left to the discretion of the Assessing Board. The Court may find other grounds upon which to set aside an assessment, but so far as the statutory mandate is concerned, that has been complied with when the Board has exercised its judgment upon the evidence before it. In the case of *Illinois Central R. Co. vs. Greene*, 244 U. S. 555, many of the same questions raised here were presented by that railroad, but this Court said:

> "The first three points relate to valuation, the last to apportionment. The district court properly held that the action of the Board must be sustained unless it was made to appear that they had adopted a fundamentally wrong principle, or had been guilty of fraud. It held further, that no fundamentally wrong principle was involved in determining whether such a railroad system should be valued on the capitalization-of-income, or the stock-and-bond plan; or, if the former, what rate of interest should be used in capitalizing, or how many years' earnings should be considered, or what was in fact the amount of net income for a given year; or, if the stock-

and-bond plan was adopted, what was the value of the stock and bonds; and that on these and similar matters the action of the Board, in the absence of fraud, was binding upon the court. In this we concur."

Again, in the recent case of *Rowley vs. Chicago & N. W. Ry. Co.*, 293 U. S. 102, this Court said:

"The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property."

D. THE ASSESSMENT WAS NOT COMPUTED BY ANY ERRONEOUS PRINCIPLE RESULTING IN OVER-ASSESSMENT OR TAXATION OF OUT-OF-STATE PROPERTY.

1. *The Finding of the trial court that there is no evidence of the use of a wrongful method by the Board should not be disturbed.*

In the first place, as hereinbefore stated, there is not one word of evidence as to what method or principle was followed by the State Board in making its assessment. The plaintiff has wholly failed to sustain its burden of proof, or to offer *any* proof whatever as to the method followed by the Board. Petitioner's contentions in this connection are so well answered by the opinion of the Circuit Court of Appeals in this case that any further argument on our part would be superfluous. We quote the following language from that opinion (found on page 313 of the record):

"* * * it is clear that the proof of the *fact* that the Board used the above five factor method is based on the *conclusions* that because the Board's assessments for several years before 1933 were not far from what would have resulted by the use of that method, and because the assessment of 1933 was the same as for 1932, it must follow that such method was carried into the 1933 assessment. But the 1933 assessment is appreciably above the result which would have been reached by applying such method. No member of the Board was a witness. No witness pretended to know all that the Board might have considered. * * * We think appellant has failed to establish that the Board was guided by or was largely influenced by the use of any particular method and, therefore, is in no position to urge the contention that property outside the State has been brought into this assessment."

Great Northern R. Co. vs. Weeks, 77 F. (2d) 405.

Add to the above the fact that the formula or method to which the plaintiff objects in this case would not have produced the assessment in any of the five years covered by the exhibits, but would have produced variations from the assessment of 5.41%, .18%, .41%, 4.29% and 24.52% in as many years (see Exhibit P, R. 277) and the fallacy of petitioner's position is obvious.

Petitioner argues that the case of *Pennsylvania Railroad Co. vs. Jacoby & Co.*, 242 U. S. 89, is authority for the proposition that the State Board must have used the method objected to, because the assessment so nearly approximates the result which would have been reached had the method been used in 1932.

Aside from the fact that in the Jacoby case the Commis-

sion's result was precisely, to the dollar and cent, the result which would have been produced by the rejected method, whereas in the instant case the discrepancy was 4.29% in 1932, the Jacoby case goes no further than to say that "the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

Here, of course, there was no jury. The Court was the trier of the facts. The issue was presented to the Court in the evidence, and was extensively argued by counsel at the hearing in the District Court. Upon all the evidence, however, the Court expressly found "that there is no evidence in this case (other than certain evidence offered to show that the assessment was in excess of actual value) that said assessment was fraudulent or made with intent to defraud the plaintiff or that it was made by any unlawful or improper method or in violation of any legislative mandate" (Finding No. 9, R. 52). The Court also expressly found "That at no time within the past ten years has the State Board of Equalization adopted any specific or definite formula or method of calculating the value of the railroads operating in the State of North Dakota, but the State Board of Equalization has at all times had before it, at the time of making such assessments, tables and formulas prepared by the railroads and the office of the tax commissioner of the State, and has considered the same in arriving at its assessments, but never has adopted the exact result of any of said tables, formulas or methods of computation of railroad valuations" (Finding No. 6, R. 52).

These findings are amply supported by the evidence. In addition to the fact that no witness testified to any knowledge of what method the Board used in 1933, the evidence

discloses that for the year 1932 and four preceding years the assessment was never in an amount which would be the result of any of the formulas used, and also that during the years Mr. Baker was deputy tax commissioner (prior to 1933) there were two classes of evidence presented to the Board, that presented by the tax commissioner and that presented by the Railway Company, and the State Board gave such weight to the data as in their judgment it was entitled to, and that Mr. Baker could not give any testimony as to just what weight was given to the evidence presented to them (R. 188). This is absolutely all there is in the record with reference to the question of what method was adopted by the State Board, and it seems to us that it amply supports the conclusion of the trial court.

> "As to the terminals, the district court held that since it did not appear but that the Board had made due allowance on account of them, it must be presumed that they did make such an allowance. As to the treasury securities, the court held that plaintiff had not made an adequate showing to the Board of Valuation and Assessment; that it did not appear but that the Board had given proper consideration to them; and that plaintiff had not put the court in possession of the evidence upon which to determine whether the securities were a part of its 'unit,' or why the securities were held by plaintiff instead of being distributed to the stockholders. * * * In criticism of the conclusions of the court upon these and some other points, a most elaborate argument is submitted; but we see no sufficient ground for disturbing the decision."
>
> *Illinois Central R. Co. vs. Green*, 244 U. S. 555.

So much for the question of whether or not there is any

evidence to support petitioner's contention that the 1932 assessment was arrived at by the use of unlawful or improper methods.

As to the 1933 assessment, we admit that the fact that the 1933 assessment is identical with that of 1932, makes it appear that the Board simply adopted the 1932 assessment. But if we assume, as we should assume, that the 1932 assessment represented the actual value of the railroad, does it necessarily mean that the Board followed some improper method in taking the same figure for 1933? The statute does not permit the Board to base its conclusion strictly upon the result of some arbitrary statistical formula—to substitute tables and calculations for the judgment which it is required to exercise. The Board, as reasonable men, had common knowledge of the fact that the year 1932 was the very bottom of the depression, and under the tables ordinarily used by so-called tax-experts, the stock and bond values of the previous year are the last to be considered. They knew, as all reasonable men must know, that there was no market for any railroad, nor for countless other things they were required to assess. They knew that in such times all standard tests of value, built up for use in normal times, had failed, and that no man was competent to judge the true value of anything—that any valuation made by anyone anywhere during those times, was a little more than a guess, and a hazardous guess at that, because based on hopes and fears and speculation and panic psychology. Must it be said, then, that it was improper for the Board to conclude, after listening to the evidence and giving full consideration to all matters before it, and all matters of common knowledge, that the railroad had not changed much, if any, in value during the previous year, that its tracks and its depots and its trains were still there, and that its true value could be determined more

fairly by taking the previous year's assessment than in any other way?

2. *Even assuming the method criticised by petitioner was used by the State Board, it is not an improper method.*

Petitioner's chief attack is directed against the method of computing value advocated by the State's witness, Mr. Baker, and concerning which he testified, "I believe it is correct that schedule 4 on Exhibit P showing the five factor ratio is the one which is advocated by the state as the fairest basis of allocation." This, of course, is only the statement of the belief of an expert witness testifying on behalf of the State, to the effect that he believes this method is that which the State is contending, in this action, to be the fairest method. Naturally, his conclusion that this represents our contention in the case, does not in any manner constitute evidence that this is the method adopted by the State Board, nor negative the right of the Board to have based its decision on other tables or formulas or evidence considered by it to be more fair.

However, this is the method of computation to which so much complaint is made by the petitioner. In brief, it works out the valuation as follows (see Schedule 4, Exhibit P, R. 277):

First, the system value of the operating property of the railroad is determined by the average stock and bond value over a five year period (less value of non-operating property). Next, the system value of the operating property is determined by the net railway operating income (five year average) capitalized at six per cent. These two results are averaged, to produce a composite system value based 50% on stock and bond values and 50% on capitalized earnings.

This composite system value is then allocated among the States on what Mr. Baker calls a "five-factor basis of allocation." The five factors averaged for this purpose are: (1) all track mileage, (2) physical property (I. C. C. valuation plus additions and betterments, less depreciation), (3) ton and passenger miles, (4) car and locomotive miles, and (5) gross earnings. The last three items he designates as the "use factors." North Dakota's percentage of all track mileage, physical property, ton and passenger miles, car and locomotive miles and gross earnings, having been determined, these five percentages are averaged together, to produce Mr. Baker's composite allocation factor. The composite allocation factor is then applied to the composite system value, to produce the value of North Dakota's share of the railroad.

Petitioner challenges the propriety of this method on two principal grounds: First, that the period used for determining stock and bond values and capitalizing earnings is too long, and results, in 1933, in an over-assessment, and, second, that the allocation factors used operate to tax out-of-state property.

(a) *The use of a five year period for determining stock and bond values and for averaging capitalized net earnings is not unreasonable.*

It is obvious that it can make no difference in the long run whether a one year period or a ten year period is used—if the same period is used year after year, the net result will be the same. Mr. Baker testified (R. 147) that "most taxing boards, economists and in fact most railroad men have always adopted the five year period in order to give stability to the tax value so far as the railroad is concerned and also

as far as the State is concerned. As far as the State is concerned stability in assessments are vitally important. As far as the railroad company is concerned it is immaterial whether the five year period or a shorter period is used, as in the long run the total assessment would work out the same."

The railroad contends that, instead of a five year period, the one year period should be used. Of course, the one year during which they would average stock and bond values would be the year 1932—the very bottom of the depression. The average of twenty rails listed in the Dow-Jones & Company averages fell from 189.11 in September, 1929, to 13.23 in July, 1932. The average market price of Great Northern stock in 1932 was $13.20. Yet in the five years ending in 1932, the company had declared dividends totalling $20.00 per share, and the stock had earned $29.81 per share (see Exhibit C, R. 253, and explanation thereof at R. 157).

The same contention is made with reference to the period of time used for determining the capitalized value of the property. Mr. Baker justifies the use of the five year period as follows: "Average earnings for a period of five years preceding the assessment date are usually considered. The use of a single year's earnings as the basis from which to determine the value of a railroad property is seldom, if ever, given serious consideration. A shorter period than five years is sometimes advocated and used, but the generally accepted test period is a five year period. The use of a three year period at the present time, when two of the three years, namely, 1931 and 1932, are the worst years in railroad history in the Northwest since the panic of 1893, in my opinion has but little justification. The railroad plant is still in existence and also its capacity to earn. The use of a three year period by the State Board of Equalization in 1933 could only be justified if the Board had positive proof that the

average earnings of those three years was a correct index of the future. Manifestly no such proof could be produced. I make that statement because as a general policy the five year period had been the period which had been given the same weight by the board for a good many years" (R. 148).

Petitioner's reply to the above is found on page 27, *et seq.*, of its brief. Much attention is given to a detailed statement of how badly the business of the railroad had fallen off during the years immediately preceding 1933, and to estimates made by the general auditor of the railway and other officers as to how little of the old business might be expected to return to the railway after normalcy returns. It cannot be too strongly emphasized at this point that *not one word of this testimony was submitted to the State Board.*

Also, in connection with this argument of petitioner, we are rather surprised to find appended to petitioner's brief in this Court, Appendix A, being purported extracts from the Seventh Biennial Report of the North Dakota tax commissioner to the governor and legislature for the fiscal years 1923 and 1924; Appendix B, being purported extracts from the Tenth Biennial Report of the North Dakota tax commissioner to the governer and legislature for the Biennial Period 1928-1930; and Appendix C, being purported extract from a report of the Committee on Interstate and Foreign Commerce of the House of Representatives recommending passage of H. R. 3263.

These reports are appended to the brief with the explanation (Petitioner's Brief, p. 21) that "These reports are not in the record, but they are public documents of which the courts will take judicial notice." We do not understand that the Supreme Court will take judicial notice of anything not brought to the judicial notice of the trial court, nor do we understand that even the trial court would have taken

judicial notice of these reports. They are not "books kept in any public office," nor are they exemplified or attested in accordance with R. S. 906; Sec. 688, Title 28, U. S. C. A.

There is nothing particularly beneficial to the petitioner in any of these reports, and we have no objection to the Court considering the same if deemed pertinent—but their inclusion in petitioner's brief is but another evidence of petitioner's lack of substantial foundation for its contentions. Petitioner not only insists that the State Board of Equalization should be reversed by the Court because it did not take into consideration matters not presented to it, but now insists that the District Court and the Circuit Court of Appeals should be reversed because of matters not presented to either of such Courts, but presented now, for the first time, in the Court of last resort, as unauthenticated and unproved appendices to petitioner's brief.

So much for the merits of use of the five year period for averaging stock and bond values. We again call attention to the fact that on such questions as the length of the period which should be considered in determining stock and bond values and earnings, the action of the Board, in the absence of fraud, is binding upon the Court. *Illinois C. R. Co. vs. Green*, 244 U. S. 555.

(b) *The use of the five-factor method of allocation of system value does not result in the taxation of out-of-State property.*

Petitioner would have us discard entirely *all* of the accepted bases of allocating system value among the States, except possibly that shown by relative cost of the property, as shown by the I. C. C. estimates of cost of reproduction less depreciation plus additions and betterments. The other

four factors in general use, namely, track mileage, car and locomotive miles, ton and passenger miles, and operating revenues are all attacked upon the ground that their use imports into the State the values of outside property.

This is a new and novel contention, and one which, so far as we have been able to determine, has never been raised before in railroad tax cases except in connection with the track-mileage factor. The argument proceeds upon the proposition that the use of the factor "miles of all track" assumes that every mile on the system is as valuable as every other mile, and that the same vice exists in the use of the other factors above outlined.

Of course, this contention is more or less true as to the track mileage factor, and the use of the mileage of *main* track as a *sole* basis for determining the allocation of railroad values for the purpose of a special excise tax was condemned by this Court in the case of *Wallace vs. Hines*, 253 U. S. 66, cited by appellants.

That case, it will be observed, was before this Court on the allegations of the bill only. It appeared that the State excise tax there under consideration, as administered, required the tax commissioner to fix the total value of the railroad by the total value of its stocks and bonds, and to allocate that total value upon the basis of relative main-track mileage. The principal basis of the decision against the validity of the tax appears to be that no deduction from total value was to be made for stocks and bonds issued upon the security of non-operating property. Of course, for the State to tax such property would be to tax something outside of its boundaries, and property outside of the State can be considered only when it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. That proposition

seems no longer open to argument, and is not, of course, involved here, for, as will be shown later, the computations of Mr. Baker do deduct the value of all non-operating property from the total stock and bond value determined by him.

However, the Court does call attention to the fact that North Dakota is a level State, mainly agricultural, without great markets and distributing centers and valuable terminals, and upon that state of the record, basing its decision on the allegations of the bill "which is all that we have before us," the Court does say: "So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain."

No evidence was before the Court. Can it be said upon the *facts*, not the allegations of the bill in that case, that the distribution according to *all* track mileage is unjust? Bear in mind that in this case Mr. Baker has used in his computations the factor of *all track mileage*, not *main track mileage*. Main track mileage gives no weight or credit for the hundreds of miles of extra switching tracks, etc., in terminals and at distributing centers. All track mileage gives credit for every foot of every kind of track on the system.

Would this Court in the case of *Wallace vs. Hines* have condemned a mileage prorate under the facts here proven? North Dakota's trackage operated at the end of the year 1932 was 19.96 per cent of that operated on the entire system. During the preceding five years the average mileage of cars and locomotives carrying revenue freight in North Dakota was 20.4% of the system mileage; the total tons and passengers carried one mile in North Dakota was 18.93% of the system total; the gross operating revenues in North Dakota (apportioned to North Dakota on the basis of the miles each particular shipment was hauled—R. 153) were 18.45% of the system total. These three factors, which in-

dicate the use to which the system is being put in North Dakota, clearly contradict the allegations of the bill on which the Supreme Court was passing. The average of the three use factors is 19.14%, as compared with 19.96% for trackage. Then Mr. Baker reduces the grand average by adding in the physical property factor, amounting to 13.84% of the system, which reduces the grand average to 18.34%. (All percentages in this paragraph taken from Exhibit N, R. 273.)

This presents quite a different picture than that before the Court in *Wallace vs. Hines*. Here it is demonstrated that the use of the property in North Dakota corresponds almost exactly with the main track mileage. Here main track mileage is averaged in with I. C. C. cost of reproduction, less depreciation, and the three use factors, to arrive at a composite factor of allocation, the best method of ironing out inequalities yet devised.

Nor did the Court have before it Defendant's Exhibit J (R. 267) disclosing that in 1932 North Dakota carried 378,498 revenue ton miles of freight per mile of track, while the whole system carried only 358,909 revenue ton miles per mile of track, and in 1933 North Dakota carried 449,106 revenue ton miles to 455,059 revenue ton miles per mile of track on the entire system. (See discussion of this Exhibit at R. 165.) Neither did the Court have before it Exhibit K (R. 269) showing that in 1932 the operating revenue in North Dakota per mile of track was 94.73% of the system average, that the tons of revenue freight and the passengers carried one mile were 104.71% of the system average, that the cars and locomotives moved one mile in North Dakota were 103.23% of the system average, and that the composite of these three (operating revenues, car and locomotive miles and traffic units) represented 100.89% of the system

average. (See discussion of this Exhibit at R. 166.) Nor did it have before it Exhibit L (R. 271), disclosing that the operating ratio, that is, the ratio of operating expenses to total operating revenues, in North Dakota for the eight years previous to the assessment was only 62.44% as compared with 67.71% for the system, thus enabling North Dakota mileage, though producing less gross revenue than the average miles of the entire system, to show a greater profit per mile. (See discussion of this Exhibit at R. 166.)

It is true enough that the Courts have rather generally thrown out the track mileage factor when it has been the sole test used, and they have occasionally disapproved the use of it in connection with other factors when the record is clear that this factor produces results grossly disproportionate to the results shown by the use factors. To put it in the language of this Court:

> "Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary."
>
> *Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55.

Now, the figures in that case disclose that Wyoming's percentage of system on the basis of traffic units was only 1.58%, on the basis of use of rolling stock was only 1.65%, on the basis of the average between gross and net operating revenues was only 1.89%. The average of these three use factors combined is only 1.79%. Yet the Court, while disapproving the mileage factor as the sole test, approved the

action of the State Board in averaging in with these three use factors the factor of main track mileage, which gave Wyoming 3.29% of the system.

In the Rowley case, therefore, where it appeared that the main track mileage factor was almost twice the average of the use factors (192%, to be exact), the Court approved its use in combination with the other factors. Compare this with the present case before this Court, where the average of the three use factors used gave North Dakota, for 1933, 19.14%, and the mileage factor used (all-track mileage) gave North Dakota 19.96% of the system. Instead of the mileage factor being 192% of the average of the use factors, as in the Rowley case, here the mileage factor is only 104% of the average of the use factors. If the 92% spread in the Rowley case was insufficient to require the elimination of the mileage factor, how absurd it is to say that the 4% spread in the present case is sufficient to destroy the validity of the mileage factor as a test of relative value! The fact is that the record here shows by far the closest relation between the results of the mileage factor and the use factors of any case we have seen, and the difference between them is so small as to be unworthy of any serious attention.

But appellant would condemn not only the track-mile factor, but the use factors as well, upon the theory that they produce exactly the same results as the mileage factor, and are attended with the same vices as the mileage factor.

The figures shown in the various exhibits in this case for the various factors do come so close together that it would almost seem that the above statements might be justified. But it so happens that the conclusions are clearly wrong, and the only proper conclusion to be drawn from the closeness of the results of the various factors in North Dakota

is that the average mile in North Dakota does just about the average amount of business and uses about the average amount of equipment and brings in about the average amount of gross revenue—in short, that the average mile of track in North Dakota is worth just about the average of the entire system.

For instance: If these use factors are only track-mileage factors under another name, how does it happen that in Wyoming the track-mileage factor gives Wyoming just about twice as large a percentage of the system as the combination of the three use factors gives? (*Rowley vs. C. & N. W. Ry. Co.*, 293 U. S. 102, 55 S. Ct. 55, at page 58.)

Again, the report of *C. & N. W. Ry. Co. vs. Eveland*, 13 F. (2d) 442, at page 444, discloses that the total system value of the railroad there considered was $348,125,629, and the average value per mile $42,423—giving us a total system mileage of 8,200 miles. South Dakota, it is shown, had 1,230.45 miles of the total—so its mileage percentage of the system was 15%. With 15% of the railroad's mileage in South Dakota, the next column of the opinion discloses that the railroad's operating revenues (distributed on a mile-haul basis) from South Dakota were only 4.56% of the system, and that the ton and passenger miles were only 6.90% of the system. If the distribution of railroad gross revenues on a mile-haul basis is merely to use the track-mile factor under another name, how could South Dakota have a mileage factor more than three times the revenue factor, and over twice the ton and passenger mile factor?

We think it is obvious that these factors are not constant, and that in many States they produce greatly disproportionate results. As said by this Court:

> "The value of the property results from the use to which it is put and varies with the profitableness of

that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use."

Cleveland, etc., Ry. Co. vs. Backus, 154 U. S. 439.

The factors of gross operating revenues, ton and passenger miles and car and locomotive miles show to a certainty the use to which the property is being put. They vary in different years as the mileage factor does not vary. They show that miles in one state may receive much less use, and much less revenue, than the average on the system. * * * but that does not happen to be the case in North Dakota.

If we are going to abandon these tests which have been used in allocating railroad values, we might as well abandon the whole system of valuing railroads which has been in use. The basis for taxation is the value of the property.

"It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon value."

Cleveland, etc., Ry. Co. vs. Backus, 154 U. S. 439.

The substance of the theory so urgently relied upon by appellant would be simply this: The only satisfactory basis of allocation of system value is the allocation thereof on a net earnings prorate. But net earnings are not the test of value. It is *property* we are taxing. Why not abandon the whole complicated set-up of arbitrary formulas and computations, and simply say the board shall use its best judgment in arriving at a value of the local property? What better proof could there be of this (if we are to abandon all idea of judging railroad values on the basis of use) than the figure fixed by the Interstate Commerce Commission, which purports to show the cost of the property new, less depreciation, plus additions and betterments? The assess-

ment complained of is $78,832,888. The I. C. C. value as of 1932 was $78,057,633 (Ex. N, R. 273)—or 99.7% of the assessment. The railroad is permitted to fix its rates upon the basis of this investment in North Dakota. If the time has come to abandon the tried and tested methods of valuing a railroad system and apportioning that value on the basis of the use to which the property is put in the various States, then we are satisfied to let the judgment of the Interstate Commerce Commission guide us in determining value.

(c) *The facts upon which petitioner relies to show unfairness in the criticised method were not before the State Board, and the railroad, itself, actually used the criticised method in its brief before the State Board.*

Many pages of petitioner's brief, and many more pages of testimony, are devoted to a discussion of such propositions as the probability of a permanent loss of income for the railroads by reason of other forms of competition; the difference in the weight of rails in North Dakota from that on the balance of the system; the difference in carload weights in North Dakota and elsewhere; a comparison of branch line and main line mileage, tunnels, bridges, grading, snow-sheds, stations, terminals, mountain construction, and various similar matters.

Not one word of this evidence was given the State Board of Equalization. This is all heard, for the first time, when the case came before the trial court. What did the petitioner give the Board of Equalization upon which to exercise its judgment? Exhibit Z-2, at page 295 of the Record, is the brief of the Great Northern Railway Company to the State Board upon the question of its 1933 assessment. It

is a brief which follows the traditional and established line of argument. It does object to the use of the five-year period for averaging stock and bond values and capitalizing net income, but proceeds to show what the railroad contends to be its system value upon a five-year, three-year and one-year basis. But what does it say about expensive mountain construction and terminals and all the other matters now so vigorously presented to show that the five-factor method of allocation is improper? Not one word. It explains the tabulations attached thereto as follows: "This statement shows the proportion of the system value assigned to the State of North Dakota by the use of the composite ratio which gives equal weight to each of the four factors: mileage all tracks operated, car and locomotive mileage, revenue traffic units and gross operating revenues. The North Dakota proportion of the average system value computed as herein set forth is $64,814,280. This amount is $14,035,744 less than the assessed value of this company's property for the year 1932.

"This statement further shows North Dakota's proportion of the system value by use of the composite ratio which gives equal weight to the three factors: car and locomotive mileage, revenue traffic unit and gross operating revenues. This three-factor composite ratio was used as the proper ratio for allocation of system value in recent railway tax cases in North and South Dakota. North Dakota's proportion by the three-factor ratio, 19.14%, is $64,110,870, as clearly set forth in Table I. This amount is $14,739,154 less than the assessed valuation of this company's property for the year 1932" (R. 295).

The above computations refer to the results which would have been produced by allocation of system value based upon five-year averages. The brief then goes on to show

the results of the same method of allocation applied to a system value based upon three-year average, and one year only.

But as to the system of allocation used, the railroad's tax department, instead of objecting to the method long followed by the State tax commissioner in allocating system value, not only adopted and used it, but eliminated from his calculations the one factor, physical property, which Mr. Baker has used, and which materially reduced the composite ratio used in his computations!

It should be said to the credit of Mr. Schoettler, the railroad's tax expert who presented this brief to the State Board, that when he was called as a witness in this case his testimony was limited strictly to his opinion concerning system value and he made no attempt to overthrow the method of allocating system values which he, and all other tax experts, had used (with some minor variations) for many years (R. 79). The railroad's testimony concerning the invalidity of this method of allocation was all supplied by its general auditor, Mr. Turnburke, an able and ingenious statistician and rate expert, but a man who had never in his life appeared before a tax board nor computed nor submitted any statistics for tax purposes, and who did not even know what his company had submitted to the North Dakota State Board or the Board of any other State along the line of the Great Northern for any year (R. 129). His ingenious theory of allocation, by which he would apportion system value in proportion to relative earning capacity of the property in each state, was not presented to the State Board, but was, in fact, developed for use in this lawsuit after the 1933 assessment was made (R. 129).

And yet, upon the basis of evidence never submitted to the State Board, upon the basis of a new and untried theory

of valuation, some of the necessary data for which could not even be secured from any record either in the office of the tax commissioner or the Railroad Commission of this State (R. 136), promulgated by a man not versed in tax matters, opposed to the very method used by the railroad's own tax experts before the Board, the railroad would have this Court say that, if the Board used the method followed with practical uniformity by tax men the country over, and followed by the railroads and the tax commissioner of North Dakota for a long period of years, it used an unjustified and unlawful method of calculation, and its assessment must therefore be annulled.

We insist that the petitioner, by its brief and its evidence before the State Board, is estopped to challenge the method of assessment complained of, even if it were established that such method was used. Surely the railroad should not be permitted to trick the State Board of Equalization into making an over-assessment by presenting all its evidence to the Board upon the basis of the standard methods of calculation of values, and then, after such assessment is made, come into a court of equity and pray for relief upon a new line of argument, a new theory, based upon facts and evidence and conclusions which the State Board was denied the opportunity to study or pass upon. The taxing authorities of a sovereign state are entitled to greater respect than this.

> "This Court must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the states, and precluding temporary federal judicial interference with it save in clear cases."
>
> *Chicago, G. W. R. Co. vs. Kendall*, 266 U. S. 94.

We submit, therefore, that there is no proof whatever that the State Board used the method complained of in making

its 1933 assessment; and that even though it were proven that the State Board used this method, it does not result in over-assessment nor in the assessment of out-of-state property; and we vigorously insist that plaintiff is estopped to contend that the method of allocation therein followed is improper or illegal.

E. The Assessing Board Was Not Guilty of Fraud, Either Actual or Constructive.

1. *It is admitted that there was no actual fraud.*

No contention was made before the District Court or the Circuit Court of Appeals, nor is any contention made in petitioner's brief in this Court, that the Board was guilty of any actual fraudulent intent. The only contention is that the evidence concerning the assessment is such as to lead to the conclusion that the Board was guilty of constructive fraud.

2. *The Board was not guilty of constructive fraud.*

We understand that to render the assessment void because of constructive fraud, it must be shown either that it was so grossly excessive as to shock the conscience of the Court, or that it was made as a part of a long-continued system or practice of over-assessment.

(a) *The 1933 assessment was not grossly excessive.*

Petitioner's brief contains many statements which would indicate that the 1933 assessment is shockingly excessive. In the statement of the case at page 6, it is indicated that the true value of the railroad in North Dakota is only $25,000,000, contrasted with the $78,832,888 assessment. It will be observed, however, that in order to reach this re-

markable conclusion, it has been necessary for petitioner to pyramid a series of unwarranted calculations. First, the stock and bond value is taken for only the one year, 1932, which, as hereinbefore set out, clearly did not represent anyone's honest judgment of the value of the underlying properties, but represented instead pure panic psychology. Next, it is said that the State "agrees" that 30.29% represented the value of non-operating assets. It is true this represents Mr. Baker's conclusion, but his testimony and that of the railroad's expert, Mr. Schoettler, both show that this is merely the conclusion of one expert witness, upon a proposition which cannot be determined with any degree of mathematical accuracy.

Next, net earnings are capitalized at 6% for the average of three years (when five years is the standard period) to produce an earnings value of $199,291,550, and the statement is made that future earnings possibilities indicate that there is no reason to expect that the property will ever earn more than *seven* per cent on a system value of $200,000,000. Why 7% is chosen instead of 6% is not explained. Then it is said that less than 1/7 of the physical plant is located in North Dakota, and that this part of the plant had less than average traffic density and originates less than an average amount of traffic, and that a comparison of net earnings indicates that the property in North Dakota indicates that North Dakota had less than 1/8 of the net earning capacity of the system. As hereinbefore pointed out in detail, none of this evidence was before the State Board. But petitioner proceeds to take the system value (arbitrarily arrived at as aforesaid) of $200,000,000 and divide it by eight, producing the so-called "sound commercial appraisal" of $25,000,000.

These figures should be contrasted with the request made

by the railroad when it appeared before the State Board of Equalization at the meeting when the 1933 assessment was fixed: "We respectfully submit that this company is justly entitled to a reduction in its assessment for 1932, and urgently request that the Great Northern assessment be fixed at an amount not in excess of $60,000,000" (R. 300).

So much of petitioner's argument is based upon the new and novel theory offered by Mr. Turnburke, general auditor for the railroad, that we feel we should briefly analyze his contentions.

(1) *The Turnburke theory as to the proper basis for taxable value is not sound.*

At the outset it is worthy of note that Mr. Turnburke does not represent himself to be an expert on tax matters, in any sense of the word. He is the general auditor of the appellant, and has general supervision of reports made to the various State Railroad Commissions and the Interstate Commerce Commission (R. 87). He has never appeared before a Tax Commission, does not know who has appeared, and does not know what basis they used (R. 129). The whole body of his testimony discloses that while he is an able statistician and has had much experience before rate-making bodies, this is his first experience in the field of taxation.

Interesting, also, in this connection, is the fact that appellant did have on the stand a real tax expert. Mr. W. L. Schoettler, the assistant right of way, land and tax commissioner for the appellant, has been with the appellant over 27 years and held his present position since 1925. He handles all reports to taxing officials and attends hearings before Tax Commissions, State and County Boards of Equalization, budget hearings and all matters concerning ad valorem taxes on the Great Northern Railway and its subsidiary companies.

It has been part of his duty for many years to appear before public taxing authorities along the system to discuss assessments and valuation of the various properties, both of the railroad and the physical property of subsidiary companies whose stocks and bonds are owned by the Great Northern (R. 79).

This witness discussed in some detail the method of arriving at *system value*, but counsel very carefully avoided asking him a single question in connection with the method of apportionment. Not one word in favor of Mr. Turnburke's method of allocation could be said by the railroad's own expert who has spent his life in tax work! On cross examination he said, with complete candor, "So far as I have been able to discover, no method has yet been developed which can in an exact and scientific manner fix the true value of the State's share of an interstate railway. In each case all the surrounding facts and circumstances, the conditions and the times and all that sort of thing have to be taken into consideration in order to arrive at a reasonable approximation of true value, as well as the peculiar conditions of each road" (R. 86).

Mr. Turnburke's method of allocating earnings to States may be thus briefly described: He first apportions interstate revenues in proportion to dollars worth of service employed in the transportation, then adds local revenues earned wholly within the State, then deducts expenses incurred in the State to determine the State's net earnings, and finally apportions system value in proportion to the relative earning capacity of the property in each State as thus determined.

This theory does not speak with the authority of a well established method of determining either earnings, by States, or true value. It was used by Mr. Turnburke some ten years ago in a rate case. This is the only use which the records or

the cases show ever to have been made of the theory. It was not submitted to the State Board.

It sounds perfectly plausible and easy to make an exact determination of the proper apportionment of gross revenues on this basis.

The very first step in the calculation, however, requires the ascertainment of something not susceptible of exact ascertainment—it requires the ascertainment of the "average operating cost per ton mile" in each State, and then the average cost per ton mile for the use of plant in that State. An examination of the testimony of Mr. Turnburke and the exhibits offered by him, at least, fail entirely to disclose any accurate or scientific method of discovering this first requirement. Mr. Turnburke's own statement as to its accuracy is as follows: "By working it out on the basis of the total ton miles in each State as I have just described it, I would not get identically the same result for each State to the last dollar and cent that I would get by allocating each individual movement separately, but it would be the same if the revenue for each shipment bore the same relationship to the cost of such shipment. This, of course, is not true as to every shipment as some rates are higher in proportion to cost than are others. However, it is generally true, as pointed out by Mr. Beidelman, that it has been the policy of both the company and the Interstate Commerce Commission to increase rates in the higher cost territory in order to cover the increased cost and while there may be individual rates that are higher or lower than others in proportion to the net or in proportion to the cost, thus giving a different net, I believe that when you take the total traffic of all kinds passing through any one State we will find that the total revenue bears about the same relationship to the total cost in all cases" (R. 89).

Compare this with the testimony of Mr. Beidelman, freight traffic manager of the Great Northern (R. 65), when he says: "It is true today that transcontinental rates are fixed almost entirely upon a competitive basis with the Panama Canal and without regard to expenses of operation in various States; that is, we make them as low as we can and still have some profit over and above what we estimated to be our *out-of-pocket* cost."

Mr. Baker lists the objections to Mr. Turnburke's formula as follows: It assumes an idealistic rate structure, in which all rates are based upon cost of service, including a percentage return upon the cost of the property. It gives no weight to the character of the traffic in any State, whether the traffic is high grade or low grade traffic. It spreads out over the entire system all the revenue from traffic which is confined to the two States of North Dakota and Minnesota. It is based in part upon the theory that rates are everywhere adjusted to costs of service, whereas rates are largely fixed on a competitive basis, the rates on all commodities are not the same, rates being fixed according to the value of the commodity carried to a greater extent than they are on the cost of service (R. 188).

That the theory, founded, as it is, upon the hypothesis that railroad rates are based upon cost of service plus a reasonable rate of return on the investment, is unsound, is, we believe, clearly demonstrated by the authorities.

The entire history of freight classification demonstrates that relative freight rates have not been based upon the fair proportionate cost or the value of the service alone or in combination.

Atchison, T. & S. F. Ry. Co. vs. U. S., 203 Fed. 56 (aff'd in 231 U. S. 736).

The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and has often been remarked.

Northern Pacific Ry. Co. vs. State of North Dakota, 216 U. S. 579.

The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a rate at which some such part would be unremunerative.

St. Louis & S. F. R. Co. vs. Gill, 156 U. S. 649.

The reports of the Interstate Commerce Commission are replete with decisions approving special rates which pay only the "out-of-pocket" costs. See, for instance:

Reduced Commodity Rates to Pacific Coast, 89 I. C. C. 512.

Lumber Rates from the Southwest to Points North, 29 I. C. C. 1.

We submit that the theory submitted by Mr. Turnburke is more unfair and unreliable than the methods of ascertaining value which have long been in use, and that it requires more arbitrary assumptions not warranted by the facts.

(2) *Assessment of interstate railroads is not an exact science, and all formulae are mere approximations of actual value.*

We feel that the general analysis of the various and sundry formulas and methods which have been developed by taxing authorities and experts for the assessment of railroads, as given in frank detail by Mr. Baker, set forth on pages 144 to 155 of the transcript, presents about as clear and comprehensive picture of the whole field of railroad taxation as could

possibly be given within the range of ten short printed pages. Here Mr. Baker, a specialist in tax matters for the past 21 years, deputy tax commissioner of North Dakota for 13 years, and for the past two years engaged in special tax work as a "tax specialist" (R. 144), with complete candor, discusses the various methods of arriving at a valuation for railroads, and frankly points out the merit or lack of merit of each. As this is the only place in the entire record where any statement of these underlying principles is found, we especially recommend these ten pages to the consideration of the Court.

We do not propose to burden the Court with a re-statement of Mr. Baker's testimony. We point out merely that at every step of the way assumptions have to be made of facts which are not subject to exact determination, and that any formula or method must, of necessity, be but an approximation of true value. For instance:

The first step in valuing a railroad is to determine the value of the entire system (R. 145). This is usually accomplished either by determining the total market value of its stocks and bonds, or by capitalizing the net earnings of the railroad, or by a composite of the two.

Here at the very outset we find the necessity of making an arbitrary determination: Shall we take the stock and bond value as of April 1, the assessment date? Shall we average it over a period? If so, how long a period should be selected? The statistician having made his choice of the above arbitrary alternatives, then sets down his market value of stocks and bonds (or average value over a period) as the actual value of the railroad system. But assuming the correct period has been used, is this necessarily true? Is it not, in itself, an arbitrary assumption? Is market value of stocks and bonds an absolute criterion of the value of a property,

particularly in times like these? When the total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and one-half billion dollars in September, 1929, to fifteen and one-half billion dollars in July, 1932 (R. 147)—three years next preceding this assessment—how much weight can we give to stock values? When the average of twenty railroad stocks fell in the same period from 189.11 in September, 1929, to 13.23 in July, 1932 (R. 147), does this, on the face of it, represent the considered judgment of the investor as to the value of the railroad, or does it reflect, instead, the panic conditions which have seized upon us? Can it be that the aliquot portion of a railroad represented by one share of stock has dropped in these three years from $189 to $13? To ask the question is to answer it. Probably neither $189 nor $13 represents the true value of that share of the railroad, and to assume that an average of the two represents the true value is again to make an arbitrary assumption, not based on any demonstrable fact. All this uncertainty is developed at the very first step of our computations.

The next step is to subtract from the average market value of stocks and bonds, the value of the non-operating property, which is otherwise taxed, and therefore not to be included in the taxable valuation which we are attempting to reach. How do we go about ascertaining this value? Once more by arbitrary methods. Mr. Schoettler, the deputy land, tax and right of way commissioner of the Great Northern, would have us capitalize the income of some of the non-operating property, would have us accept the assessed valuation as fixed by various State authorities for other property, and would have us accept his estimate of the value of still other non-operating property (Ptfs. Ex. 8, R. 233). Any one of these methods of ascertaining value is arbitrary in itself, and cer-

tainly the selection of the various items which must be valued by the various methods is arbitrary. Mr. Baker attempts a more scientific method. He attempts to assign to non-operating property its relative share of the stock and bond value as measured by relative investment and relative earnings, giving 50% weight to investment and 50% weight to earnings over a period of years (Ex. I, R. 162). But the determination of the period of years to be used, the rate at which earnings should be capitalized and the weight to be given to investment and to earnings, all, again, are arbitrary.

And so it goes throughout the whole course of any computation of railroad values. No one of the factors used for allocation of system value among the States is exact—if it were, there would be no need of using any others. This is true concerning the method of apportionment contended for by the railroad as well as that contended for by the State's witnesses. See Mr. Schoettler's frank statement at page 82 and again at page 86 of the abstract. A mistake in judgment early in the computations is apt to result in the pyramiding of a minor error into a gross error at the end, as is exemplified by petitioner's calculations at pages 5 and 6 of its brief. As was well said by this Court:

> "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property."
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> *Rowley vs. C. & N. W. Ry.*, 293 U. S. 102, 55 S. Ct. 55, No. 9, decided Nov. 5, 1934.

No further argument is required to demonstrate that the Board of Equalization is not bound by law to accept the results of any formula devised by a tax expert, however capable and honest, but on the contrary it would be a violation of the Board's duties to do so.

(3) *Use of the standard methods of allocation of system value to the State of North Dakota produces results approximating true value.*

As we have said before, no method has ever yet been devised to give an absolutely accurate yardstick for the measurement of the value of that part of an interstate railroad lying within any given State. The best that can be hoped for from any system is an approximation. Yet

> "It will not do to say that the valuation of a piece of property is mere guess-work. True, it is often largely a matter of opinion, and mathematical exactness is not always possible. Various elements enter into and affect an opinion respecting the value of a given piece of property, and all that can be required is that the assessing board exercise an honest judgment based upon the information it possesses or is able to acquire. That valuation is of the property as a totality, and it is unnecessary in making an assessment to disintegrate the various elements which enter into it, and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value."
>
> *People ex rel. Brooklyn City Railroad Co. vs. State*, 199 U. S. 48.

There is no good reason to suppose that the methods of allocating system value among the States which have stood the test of time, which have been approved by tax experts,

taxing commissions and courts alike throughout the entire country, should suddenly lose their validity. Of the nine methods discussed by the committee of The National Tax Association in its report of 1923, the State tax commissioner and the railroads alike have used track mileage, physical property, car and locomotive miles, ton and passenger miles, and operating revenues, or some of them or some combination of them for many years in computing North Dakota assessment (R. 151). Mr. Baker, in his exhibits, shows how these various factors of allocation work out. He has not confined himself to any one system, but has given the Court the benefit of calculations upon various combinations of these factors (Exhibits P and Q, R. 277 and 278).

The principle that the system value of an interstate railroad should be allocated among the States on the basis of factors reflecting the use of the property in the various States has long been recognized. Some of the cases have approved allocation on the basis of miles of track, others have recognized allocation on the basis of various other factors. No case has ever disapproved the use of the five-factor method recommended by Mr. Baker as the fairest one, nor any comparable method.

Rowley vs. C. & N. W. Ry., 293 U. S. 102.
Chicago, B. & Q. R. Co. vs. Babcock, 204 U. S. 585.
Louisville & N. R. Co. vs. Greene, 244 U. S. 522.
Southern R. Co. vs. Kentucky, 274 U. S. 76.
Erie R. Co. vs. Pennsylvania, 21 Wall. 492.
Pittsburg, C. C. & St. L. R. Co. vs. Backus, 154 U. S. 421.
Pullman's Palace Car Co. vs. Pennsylvania, 141 U. S. 18.
Cleveland, C. C. & St. L. R. Co. vs. Backus, 154 U. S. 439.
Illinois C. R. Co. vs. Greene, 244 U. S. 555.
Chicago, N. W. Ry. Co. vs. Eveland, 13 F. (2) 442.

We believe that the history of the assessments of the Great Northern for the past seventeen or eighteen years demonstrates that the State Board has dealt with the Great Northern Railway on a fair and equitable basis. Defendant's Exhibit O. R. 275, discloses that since 1917, when a decree of the District Court of the United States established the true value of the Great Northern property in North Dakota (R. 171-2), reductions totalling $19,661,884 have been made—practically 20%—in the assessed value of the Great Northern. It was reduced over 8% in 1918, over 4% in 1919, 5% in 1921, increased 1.25% in 1929, and again reduced .35% in 1931, 5% in 1932 and .02% in 1933. While it appears that none of these assessments were the result of the adoption of any formula or method of calculation, the formulas and calculations of the tax commissioner and the railroads, based upon standard formulas, were before the Board, and the assessment as made apparently approximated the results of some of these formulas.

As late as 1933, when the Great Northern appeared before the Tax Board to assist in ascertaining the amount of its 1933 assessment, the railroad had not yet discovered anything wrong with the accepted methods of valuation and apportionment, and, in its brief submitted to the Board, it used and urged the use of the standard methods hereinbefore discussed—its only argument being that the period of years over which the figures should be averaged should be shortened.

(4) *The State Board was justified in leaving the 1932 assessment unchanged in 1933.*

Assuming the 1932 assessment to have been lawful and justified by the evidence (which appears to be a fair assumption in view of the presumption of regularity of official acts,

the fact that the railroad made no objection to the 1932 assessment, and the fact that no wrongful method is shown to have been used by the Board) we think that the exceptional circumstances present in the summer of 1933 were sufficient to justify the Board in letting the 1932 assessment stand for 1933.

The basis for the use of the standard formulas has been that they represented the best method by which the value of a railroad could be *figured out*, rather than estimated. But when a situation confronts the Board such as existed in 1933, would not reasonable men have doubted the validity of figures based upon stock and bond values and capitalized net earnings? Mr. Baker describes the situation (all too well known to all of us) as follows: "The depression resulted in a collapse in the stock and bond market. The forced selling that occurred during the recent depression brought stock and bond values down to a figure where, in the opinion, I think, of most of the investors, it did not fairly represent the value of the property. The purchasing power of the dollar from 1929 to 1933 very greatly increased and this resulted in a very great depreciation in security prices as well as the prices of all commodities. In the United States there was a general movement to convert property into cash, due to a collapse in public confidence, and security prices since 1929 have been extremely unstable. Some of the things that affected the security market were the exportation of gold, the policy of the Federal Reserve Banks, the collapse of the speculative bubble, the freezing of banking assets, the wide-spread failure of banks and the almost total loss of confidence on the part of the public in the integrity of American business managements. In North Dakota, in addition to the general depression, we have had drought and crop failure and ruinous prices for agricultural

products, and from 1929 to 1933 the extraordinary rise of the dollar in relation to commodity prices resulted in a universal rush to convert securities and other property into cash. The forced sale of securities, and the deposit of collateral for bank loans aggravated the decline" (R. 147).

Would a Board necessarily be unreasonable under these circumstances if it said: The situation this year is so bad that we cannot rely upon the validity of any of these figures. The assessment last year (1932) seemed fair, at least the railroad did not attempt to stop it. It was in general accord with the assessments of previous years. The railroad is still there. The trains are still running about as before. The railroad must still have, as a matter of fact, about the same market value it had last year. We will simply take last year's assessment, subtract enough to take care of the decrease in mileage, and let the 1932 assessment stand.

We do not say that this is what the Board did, for we do not know. But would that be, of necessity, arbitrary or fraudulent under the circumstances existing at the time of the assessment? As a matter of fact, we all know that is the way local assessors value most local property. They come in, look around, ask if you have anything new since last year, and put down the same figure they had last year. A store building is valued the same year after year, even when it is unoccupied—its value is not wiped out simply because it has had no earnings. We submit that in the unprecedented crisis before it, the fact that the Board adopted the assessment for the previous year (which is not admitted nor proved in the record) would not of itself be evidence of arbitrary or unreasonable conduct. Instead, it would be the application of common horse-sense, instead of the application of technical and arbitrary accounting formulas, to

the valuation of a railroad. While, as a general practice, the horse sense judgment method would probably be improper, we submit that *judgment* is what the Board is required to use, and that under the conditions existing, such a method, for a year or two, might be very honest, and very good, judgment.

We think the Board had the right, also, to consider that to follow any strict formula, based on stock and bond values and net earnings, would be to discriminate against other business properties under the prevailing conditions. Let us again quote Mr. Baker's excellent analysis of this situation: "The assessment of general property in North Dakota has not been reduced in conformity with the drastic and decreased economic return from the property and could not be so reduced without so drastic a reduction in revenues as to endanger the continuance of the functions of government. The State Board of Equalization of North Dakota in my opinion could not grant to the owners of railroad property a drastic reduction in value without gross discrimination against other property owners in much greater economic distress. I think the mere fact that the securities representing a certain class of taxable property are quoted on the market, its earnings are readily available and that consequently changes in the market value of such property may be readily ascertained, does not entitle such property to preferential treatment by a State Board entrusted with the duty of equalizing property values so that taxes shall be equitably distributed according to the market value of all classes of property. Assessing officials and equalizing boards during the last several years have been confronted with a very difficult situation. Values which had been more or less stable for a generation have melted rapidly away. If all assessments had been reduced to conform to

actual market value the State and its subdivisions would have ceased to function, as the revenue would not even approximate necessary expenses. Farm property constitutes about 65% of the total taxable value of North Dakota. An economic return from such property as will be shown in exhibits which I have prepared (Exhibits U, V, W, X, Y, Z and Z-1, R. 287, 289, 290, 291, 292, 293, 294), has decreased about 75% compared with the 1924-1928 average. Interest and taxes and cost of operation undoubtedly have exceeded the gross income by a large margin, leaving nothing for the support of the family or a return on property. Under such conditions in order to equalize the tax burden in conformity with the value of all classes of property, capitalization of five year average net railway operating income at six per cent in my opinion would result in giving preferential treatment to the railroads as compared with other property owners" (R. 149-150).

We think this analysis speaks for itself, and demonstrates the utter unfairness of which the Board would have been guilty had it, in 1933, based its assessment of the railroad strictly upon some formula depending for its computation upon figures and rates arbitrarily assumed to reflect the true market value of the property.

(5) *Assuming the 1933 assessment to have been erroneous in amount, the error is not one which the Court should attempt to correct.*

The Court is here called upon to determine something which is most difficult of ascertainment. The test of the legality of this assessment must lie in the honest judgment of the Board of Equalization. This Board consists of the governor, state treasurer, state auditor, commissioner of agriculture and labor and the state tax commissioner. Sec.

2141, *1925 Supplement to Compiled Laws of N. D.* It is definitely and strictly a lay-board. No qualifications concerning tax knowledge or experience are imposed by law upon any member. The actions and conduct of such a Board are not to be judged by any fine standard of technical nicety. The attitude which Courts must take toward such Boards is well expressed by Mr. Justice Holmes:

> "The members of the Board were called, including the governor of the State, and submitted to an elaborate cross examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the Board were not entitled to the possibly higher immunities of a judge. * * * Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. * * * All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law.
>
> "But the action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge."
>
> *C., B. & Q. R. Co. vs. Babcock,* 204 U. S. 585.

Judged upon this standard, was the action of the State Board of Equalization unreasonable or arbitrary?

The standard methods of determining system value which had been before the Board for years, submitted by both the tax commissioner and the railroads, had proceeded upon the theory that actual market value of the railroad system could be determined by the average market value of its stocks and bonds, or the capitalization of its net income, or a composite of the two.

Considering the first method—stock and bond value—the Board was confronted with the fact that there existed an unprecedented depression, the like of which had never been seen before, and which brought railroad stocks and bonds to the lowest point in half a century.

Could not reasonable men, honestly exercising their judgment, have concluded that these figures for 1931 and 1932 had lost much of their probative significance? Was it not reasonable to suppose that stock and bond values represented, under existing conditions, nothing but panic psychology and speculation? The reason for the use of stock and bond values as a test of system value is that it is supposed to represent the considered judgment of investors as to the actual worth of the share of the railroad which they were buying. But is it not a matter of common knowledge, which the Board could well consider, that investors were not buying stock on any basis of considered judgment of worth, but rather that holders of stocks and bonds, during the first few years of the depression, were rushing to liquidate their investments? The railroad complains bitterly that Mr. Baker did not give more weight to the last year or two of stock prices than for the previous years. But could not the Board have reasonably said that a share of stock which paid $5 in 1928, $5 in 1929, $7.50 in 1930 and $2.14 in 1931

—a total of $19.64 in the preceding five years—was worth more than $13.20? (Exhibit C, R. 253.) Would it not have been reasonable for the Board to have gone back and taken a longer period of years—say seven, or ten years—in order to arrive at the settled state of things, and not give too much weight to stock and bond prices which all men knew did not represent anyone's considered judgment as to actual value of the property underlying the securities?

> "At present, and during the years in question (1929 and 1930), the stock market reflected the hopes or fears of a speculating public more accurately than the taxable values of roadbed and equipment."
>
> *Pleasant vs. Missouri K. T. R. Co.*, 66 F. (2d) 842, 847.

Appellant complains that, according to the testimony of Mr. Beidelman, the future of the railroads, and particularly of the Great Northern, is very dark, and that therefore much greater stress should have been placed on later years' values than on earlier years. But the dark prophecies of Mr. Beidelman were not before the Board. He is heard from for the first time at the trial of the action. Could not reasonable men have supposed, in the absence of clear and convincing evidence (let alone the absence of all evidence) to the contrary that the railroad would come back with good times?

The next step in connection with the stock and bond method was to deduct non-operating property values from the total, as the non-operating property is otherwise taxed. Mr. Schoettler gives us Exhibit 8 (R. 233) to show us what these deductions should be. Items 1, 2, 4, 5, 8, 9, 10, 11, 12 and 20 he lists at their "assessed valuation"—as assessed by local taxing authorities. Items 2, 6, 7, 13, 14, 15, 16,

17, 18, he lists at a value arrived at by capitalizing earnings at 6%. Item 19, he simply estimates the value. Stocks and bonds alike he capitalizes at 6%. As stated by Mr. Baker: "A man buying property, an entire property, would probably be satisfied with a return of six per cent on his investment. If he bought all the bonds of that property he probably would be satisfied with a return of four and a half or five per cent, but if he bought all the stock of the property, where he is taking a greater speculative risk, he would demand a larger return, and in my opinion, seven per cent would be a more correct rate to use in the capitalization of common stock dividends to ascertain value" (R. 163). Item No. 5 of this Exhibit 8 would seem peculiar on the face of it. Mr. Schoettler would deduct the assessed valuation, $1,723,892, of the property of the Dakota and Great Northern Townsite Co., when the Great Northern owns stock of a par value of $50,000, and a book value of only $25,000? With reference to Item No. 10, Mr. Baker says: "Item 10 shows the investment of the Great Northern in Spokane, Portland & Seattle Railway Company stock and bonds. The Great Northern owns half the stock and half the bonds. The assessed valuation of the underlying properties back of the stock and bonds is listed as a proper item of deduction as to the Great Northern one-half interest. Well, now that property has been a very unproductive property as far as being an investment is concerned. It has paid its bond interest very irregularly for a long period of years and I believe never has paid a dividend on the stock and I think if the income from that property for the last five years were capitalized the Great Northern share of that income valuation listed would be around between five and six million dollars, using the six per cent rate of capitalization, in comparison with the $20,000,000 set up in Mr.

Schoettler's statement" (R. 163).

Mr. Baker, in his Exhibits D, E, F, G, H and I (R. 255, 257, 259, 265), has valued the operating property by assigning to non-operating property its relative share of stock and bond value as measured by relative investment and relative earnings over a period of years. For Mr. Baker's analysis of this method, see R. 157 to 162. He thus assigns $155,685,389 (Exhibit I) to non-operating property, as compared with Mr. Schoettler's figure of $182,235,186 on Exhibit 8 (R. 233). Surely the Board was justified in accepting a value of non-operating property similar to that arrived at by Mr. Baker's computations, especially when there are no generally accepted standards by which the value of non-operating property is to be determined (R. 162).

The next step is to determine system value by capitalizing income. What rate shall be used? How long a period shall be considered? On these and similar matters the action of the Board is binding upon the Court.

Illinois Central vs. Greene, 244 U. S. 555.

Defendant's Exhibit P (R. 277) shows the results which would be secured by capitalizing at 6% on the 5 year average. Exhibit Q (R. 279) shows the results of capitalizing at 5%—resulting in a higher valuation. Mr. Baker thinks that in a year such as 1933, when no property is earning a fair rate of return, the capitalization might very fairly have been made upon a 5% basis instead of six (R. 176). This 1% difference in the rate makes a difference of 66 million dollars in the total value arrived at, and brings the computation by the usually accepted methods very close to the assessed valuation made by the Board, even when combined into a composite factor with the stock and bond value.

We regret that it is impossible for us to analyze all the

evidence presented to the District Court, for it would run this already lengthy brief into lengths beyond all reason, but we believe that a reading of the record will satisfy the Court that reasonable men, acting honestly as public officials, but without any specialized knowledge of tax theories and economics, could well have determined the assessment of $78,832,888 to be as nearly accurate a statement of value as could be placed upon any such property.

(6) *Even if there was an over-assessment for 1933, it was not part of a continued practice of over-assessment.*

We need make no extended argument upon this feature. The decisions hereinbefore referred to, and particularly the language of Chief Justice Taft in *Taylor, et al., vs. Louisville & N. R. Co.*, 88 Fed. 373, have made it clear that occasional or sporadic cases of over-assessment cannot be remedied by the chancellor.

Exhibit P. R. 277, presents for the Court's consideration, all of the customary methods of determining railroad values and the allocation thereof among the States. These computations show, for instance, that if the Great Northern value were to be allocated solely on the basis of the so-called "use factors" its assessment for 1929 was 101.06% of true value, for 1930, 96.11%; for 1931, 96.59%; for 1932, 99.93% and for 1933, 119.32%. Adding the miles of all track factor to the three use factors, shows an under-assessment for each of the four years preceding 1933. Adding, instead of "all tracks" the factor of tracks actually owned or leased and operated (excluding 1,000 miles of track operated only under trackage rights owned and maintained by other companies) we find again an under-assessment for each of the four years preceding 1933. Adding in the physical prop-

erty factor, we find assessments amounting to 105.41%, 99.82%, 100.41%, 104.29% and 124.52% for the years 1929, 1930, 1931, 1932 and 1933, respectively. Incidentally, cost of reproduction, according to Mr. Schoettler, appellant's tax expert, is only one of the proper factors and may be not the most important one (R. 82). He did not use it in his brief submitted to the State Board in 1933 (R. 295, Exhibit Z-2).

If we turn to the next exhibit, Exhibit Q (R. 279) where net railway operating income is capitalized at 5% instead of 6%, we find that by whatever means of allocation we use, we get an under-assessment for every one of the four years preceding 1933.

It requires no further argument to demonstrate that the 1933 over-assessment (if it was, in fact, an over-assessment) was but a "sporadic case," and not the result of a wrongful course of conduct.

F. Plaintiff Has Failed to Do Equity in This Case.

Paragraph I of the defendant's Answer is a plea to the jurisdiction of the Court, and asks that the Court do not take jurisdiction of the cause of action alleged in the Bill of Complaint for the following reasons: * * * "F. That the plaintiff has a full, complete, speedy, and adequate remedy at law and that this Court is without jurisdiction to determine this matter in controversy because of lack of equity."

The petitioner has tendered and paid only 60% of the taxes levied pursuant to the challenged assessment. As low figure as sixty per cent could be reached only by the use of a new and untried theory of valuation. It is undisputed that no such method was ever presented to the Board

in this matter or any other. In fact, this method has never been used by any railroad or Tax Commission so far as any of the witnesses knew and it was prepared subsequent to the making of the assessment. There is grave doubt as to the verity and usefulness of the proposed method (see Opinion of the Court below, at page 316 of the record). In its brief before the State Board, petitioner asked "that the Great Northern assessment be fixed at an amount not in excess of $60,000,000." The assessment was fixed at $78,832,888. The tender and payment of the petitioner was on the basis of an assessed value of $47,000,000, some $13,000,000 less than the assessment requested of the State Board by the petitioner. Reduced to taxes, the petitioner has tendered and paid nearly $300,000 less than would have been payable upon the basis of the assessment of $60,000,000 requested by petitioner. We believe this discloses an entire failure on the part of the petitioner to do equity in the premises, and should deprive the petitioner of any recourse in a court of equity.

CONCLUSION.

We respectfully submit that the District Court and the Circuit Court of Appeals were right in their conclusion that the record showed no abuse of discretion on the part of the State Board of Equalization, and that the determination of the State Board upon the evidence before it, and the determination of the District Court upon the evidence before it, are sound and should not be disturbed.

Dated November 25, 1935.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions of the State of North Dakota Fixing the Power and Duty of the State Board of Equalization.

Section 179, *Constitution of North Dakota:*

"All taxable property, except as hereinafter in this section provided, shall be assessed in the county, city, township, village or district in which it is situated, in the manner prescribed by law. The property, including franchises of all railroads operated in this State, and of all express companies, freight line companies, dining car companies, car equipment companies, or private car line companies, telegraph or telephone companies or corporations operating in this State and used directly or indirectly in the carrying of persons, property or messages, shall be assessed by the State Board of Equalization in a manner prescribed by such State Board or Commission as may be provided by law. But should any railroad allow any portion of its railway to be used for any purpose other than the operation of a railroad thereon, such portion of its railway, while so used, shall be assessed in a manner provided for the assessment of other real property."

Section 2141a3, *1925 Supplement to Compiled Laws of North Dakota:*

"All property, real or personal, belonging to railroad, street railroad, telegraph, telephone, express, sleeping car, dining car, freight line and car equipment companies and used exclusively in the operation and maintenance of its lines or routes in this State and lines for the transmission of electric current, shall be assessed

for the purpose of taxation by the State Board of Equalization and not otherwise except in case of any such property as is now or may hereafter be made subject to a gross earnings tax in lieu of a property tax."

Section 2122, *1925 Supplement to Compiled Laws of North Dakota:*

"All property subject to taxation shall be assessed at its true and full value in money. In determining the true and full value of real and personal property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price at which said property would sell at auction or at forced sale or in the aggregate with all the property in the town or district, but he shall value each article or description of property by itself and at such sum or price as he believes the same to be fairly worth in money. In assessing any tract or lot of real property the value of the land, exclusive of improvements, shall be determined; also the value of all taxable improvements and structures thereon, and the aggregate value of the property, including all taxable structures and other improvements, excluding the value of the crops growing upon cultivated lands. In valuing any real property upon which there is a coal or other mine or stone or other quarry, the same shall be valued at such a price as such property, including the mine or quarry, would sell at a fair voluntary sale for cash."

pp. 3, 4, dissent

SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1935.

Great Northern Railway Company, Petitioner, *vs.* J. J. Weeks, State Tax Commissioner, et al., etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 3, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought in the federal district court for North Dakota by petitioner against the state tax commissioner and the auditors and treasurers of 30 counties to enjoin collection of about 40% of 1933 taxes laid upon its railroad properties in each county. The assessed value of all petitioner's railroad property in the State is $78,832,888. The total of the tax is $1,508,352.34 of which petitioner has paid about 60%. The suit is grounded upon the claim that the taxes are based on a valuation that includes properties located outside the State and in other respects are so excessive and arbitrary as to be repugnant to the due process and equal protection clauses of the Fourteenth Amendment to, and the commerce clause of, the Federal Constitution. Issues were joined, the case was tried, the court made findings of fact, concluded that petitioner was not entitled to relief and dismissed the bill. The Circuit Court of Appeals affirmed. 77 F. (2d) 405.

The state law requires that all property subject to taxation be assessed at its true and full value in money. Comp. Laws 1913, § 2122. The state board of equalization is required in August of each year to assess at its actual value every railroad within the State and it is governed by the rules that apply to township assessors in valuing other property. § 2242. 1925 Supp., § 2141a3. The average values per mile of main and branch lines respectively,

constitute the bases for assignment of value to counties. § 2243. And on like mileage bases the value given to each county is distributed to its cities, towns, townships and districts through which the railroad extends. § 2244. The railroad property is taxed, as is personal property, by applying the local rate to 50% of the assessed value.[1] Petitioner did not allege that other property was not assessed at its full and true value as required by state law and does not seek relief on the ground of discrimination.

Petitioner claims that the board made the assessment by attributing to North Dakota too great a proportion of a grossly excessive system valuation. More specifically its contentions are: (1) That, by reason of the methods employed for the ascertainment of the percentage of system value to be assigned to North Dakota, the assessment includes the value of property located in other States to the extent of approximately $20,000,000 and (2) that, even if the factors used to make the allocation be not condemned, the assessment must nevertheless be held arbitrary and excessive to the extent of $15,000,000.

The full and true value of the property is the amount that the owner would be entitled to receive as just compensation upon a taking of that property by the State or the United States in the exertion of the power of eminent domain. That value is the equivalent of the property, in money paid at the time of the taking. *Olson* v. *United States*, 292 U. S. 246, 254. The principles governing the ascertainment of value for the purposes of taxation, are the same as those that control in condemnation cases, confiscation cases and generally in controversies involving the ascertainment of just compensation. *West* v. *C. & P. Tel. Co.*, 295 U. S. 662, 671.

In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have. Courts decline to disturb assessments for taxation unless shown clearly to transgress reasonable limits. Overvaluation is not of itself sufficient to warrant injunction against

[1] Comp. Laws, 1913, § 2244. Initiated measure approved June 29, 1932, Laws 1933, p. 493, amending 1925 Supp., § 2122a, reduced the percentage of assessed value to be used in calculating the tax from 75% to 50%.

y part of the taxes based on the challenged assessment; mere ror of judgment is not enough; there must be something that in al effect is the equivalent of intention or fraudulent purpose to ervalue the property and so to set at naught fundamental prin-les that safeguard the taxpayer's rights and property. *Rowley Chicago & N. W. Ry.*, 293 U. S. 102, 109-111. The assessment is esumed to have been rightly made on the basis of actual value. validity must be tested upon consideration of the facts estab-ned by the evidence and of those of which judicial notice may be ken.

There is controversy between the parties as to whether the evi-nce discloses how the assessment was made. Petitioner main-ns that the record shows that the board found system value and portioned it to North Dakota and also shows the methods by ich these determinations were made. The district court re-sed to find, and the Circuit Court of Appeals held that petitioner led to prove, that the board made the valuation by methods ich petitioner claims that it employed.

1. As to methods employed by the board. Respondents called a witness Mr. Lyman A. Baker who had been with the North kota tax commissioner for 19 years and during the last 13 years, ding January 1, 1933, had been deputy commissioner in charge the valuation of railroads and other utilities. He was engaged this litigation in behalf of respondents and spent much time in aking computations and in the preparation of exhibits that were t in evidence by respondents. In substance he testified:

The first step in the valuation of railroad property within a ate is to determine the value of the entire system. There are two asses of evidence ordinarily considered: The average market price stock and bonds, and the past earnings over a period of years. s the stock and bond prices reflect value of the entire railroad, it necessary to eliminate the value of non-operating property. The ethod requires a definite period over which to average price quo-tions and that must of necessity be somewhat arbitrarily fixed. assumes that the average price reflects value, but rarely is con-olling interest bought or sold on the exchange. Where control sought prices advance sharply. The method also assumes that

purchasers act on accurate knowledge of conditions; it ignores the influence of pure speculation. In applying the method, taxing boards, economists and railroad men have always adopted five-year periods immediately preceding the assessment in order to give stability to the tax value. The depression resulted in a collapse in the stock and bond market. Forced selling brought prices down to a figure that did not fairly represent the value of the property. "Despite all these objections to the stock and bond method of valuation, I still consider it as one of the best indices of value obtainable".

He further testified: Capitalization of net railroad operating income is generally recognized as an important element in estimating the value of railroad operating property. The average net income, usually for five years, is capitalized at a reasonable rate of return. The method assumes the amount so ascertained to be the value of the property. The income of a single year is seldom, if ever, used. As 1931 and 1932 were the worst years in railroad history since the panic of 1893, the use of the three-year period ending in 1932 has but little justification. The five-year period has been given the same weight by the state board for a good many years. It is generally considered that the rate of return that a company is allowed to earn under state and federal law is a fair rate to use. A rate of six per cent. is justifiable under present conditions. Economic return from farm property, being about 65% of all that is taxable in North Dakota, decreased about 75% from the 1924-1928 average. Assessments on values indicated by capitalization of average net income for the five years ending in 1932 would result in giving preferential treatment to railroads as compared with other properties. Where properties have been operated at a loss over a period of years, there are no earnings to capitalize. Yet they have present and prospective value which would be reflected by use of the stock and bond valuation method. The criticisms made of these methods are not sufficient to render them valueless. "On the contrary the two methods are universally approved as the two best evidences of the value of a railroad which are available".

The answer alleges: In 1932 the tax commissioner made and presented to the board computations based upon a determination of

system value by the use of a composite of the average stock and bond values of the petitioner for a period of five years preceding the assessment and the average value ascertained by capitalizing net earnings for the same period; by apportioning the system value to North Dakota upon the basis of the average of five factors: (1) miles of all track, (2) physical property, (3) car and locomotive miles, (4) ton and passenger miles, (5) gross earnings, there was produced a value of $76,115,715; another apportionment on the basis of the three use factors, viz. car and locomotive miles, ton and passenger miles, and gross earnings, produced $79,417,825, and a third apportionment by the average of track miles and the three use factors produced $80,671,790. The answer further alleged that "upon this evidence and upon all other evidence and matters of common knowledge before it the Board did in the year 1932 fix the valuation of plaintiff's property in North Dakota at $78,850,024"; that in 1933 the commissioner and the railway company presented to the board the financial and operating statistics of the plaintiff's railroad and reports and computations based upon the formulas used in 1932 and other evidence of value, and that the board after full consideration of them and all other evidence of value and matters of common knowledge fixed the assessment for 1933 at $78,832,888 "which said amount represented the honest judgment" of the board "and the full and true value of the plaintiff's North Dakota property in money".

The average of the valuations computed for 1932 as alleged in the answer is $78,735,110; the assessment was $78,850,024. The difference is less than one-sixth of one per cent. The trial court found that for 1933 the board assessed the property at "the sum of $78,832,888, which sum was the same as the 1932 assessment except for a deduction of $17,136 for certain trackage of the plaintiff which had been removed".

It is clear that the computations prepared by the tax commissioner for the use of the board served as guides to, if indeed they were not used as the measure of, value for the assessments made by the board for 1932 and 1933. Respondents' answer and evidence require a finding that these computations were in fact the controlling bases and constituted the very foundation of the 1932 and 1933 assessments. In view of the relatively small differences between the

1933 assessment and the figures produced by the methods approved by respondents and universally as the best available evidence of value of a railroad, the latter rightly may be used in testing the validity of the former.

2. Petitioner's claim that the board's apportionment of system value to North Dakota operated to assess and tax property in other States cannot be upheld.

Petitioner maintains that the amount attributed to that State was found by the use of the factors above referred to. More fully described, they are: 1. Miles of all track (as of December 31, 1931) —20.19%. 2. Physical property as measured by cost of reproduction less depreciation (as of December 31, 1931)—13.84%. 3. Car and locomotive miles (average for five years ending with 1931) —19.90%. 4. Ton and passenger miles (average for five years ending with 1931)—18.65%. 5. Gross earnings (average for five years ending with 1931)—18.45%; the amount assigned to North Dakota was found by adding to the intrastate revenue earned in that State its mileage proportion of revenue derived from traffic moving partly within and partly outside her boundaries. The average of these percentages is 18.206%.

The principal grounds on which petitioner assails the board's apportionment are: Petitioner's railroad in North Dakota consists largely of relatively cheaper branch lines. The most valuable terminals and costly construction are in other States and, while these include little mileage, they contribute as much to system value in proportion to cost as do the cheaper stretches of the road where the same investment is spread over much greater mileage.

The problem of apportionment is a difficult one. It is impossible to formulate a rule generally applicable. Controlling conditions vary greatly from time to time. Allocations to be sufficiently accurate for practical purposes must be arrived at by the exercise of sound judgment based on facts that fairly reflect the relation between value of the system as a whole and value of the part within a State. *Rowley* v. *Chicago & N. W. Ry.*, *supra*, 109, 110.

The methods proposed by petitioner discredit its objections to the apportionment made by the board. While the board had the 1933 assessment under consideration, petitioner submitted to it a brief in which it proposed two methods of apportionment. One

was by use of the above described factors 1, 3, 4 and 5, and the other by use of 3, 4 and 5, producing, respectively, as calculated by petitioner, 19.35% and 19.14%. These percentages are higher than the average of those that petitioner says the board used. There is no evidence that the assessment was arrived at by use of apportioning percentages higher than those then used by petitioner.

Petitioner's bill suggests a method of apportionment that would assign to North Dakota less than 12½% of system value. Briefly, the method is this: To the revenue derived from North Dakota intrastate traffic add a part of the revenue received from the interstate moving in North Dakota that is equal to its proportion of the property used in, and the cost of, carrying that traffic; deduct the operating expenses incurred in moving it from the total revenue. The relation of the state net earnings so found to the net for the system will be the same as that existing between North Dakota value and system value. As petitioner gives this method scant, if any, support here and as it was rejected by the lower courts, we need not consider it. *U. S.* v. *State Investment Co.*, 264 U. S. 206, 211. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 558. *U. S.* v. *Commercial Credit Co.*, 286 U. S. 63, 67.

And here petitioner argues that the apportionment should be made on the basis of physical property, i. e. factor 2 above described. That would assign to North Dakota less than 15% of the system value. Petitioner did not submit it to the board as the measure or even include it in the group of factors upon which it based the calculations included in its brief. It is not sustained by evidence.

When regard is had to the size of the Great Northern system and the variety of things that affect values to be attributed to its railroad in different States and the numerous matters as to which there may be wide difference of opinion, it must be held that percentages lower than, or substantially the same as, those petitioner itself used and submitted to the board are not confiscatory or arbitrary. *Helvering* v. *Taylor*, 293 U. S. 507, has no bearing.

3. There remains to consider whether the assessment may be sustained against petitioner's claim that, assuming validity of apportionment, the valuation was arbitrarily made and is grossly excessive.

No testimony was given by the tax commissioner or any other member of the board. They could not be compelled to submit to examination as to the operation of their minds in making the challenged assessment. *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 593. *Bohler* v. *Callaway*, 267 U. S. 479, 491. It results that resort must be had to determinations of the board, findings of the lower courts, the evidence and the facts judicially known.

From the answer and evidence it unquestionably appears that the board valued petitioner's system and made apportionment to North Dakota. The assessments for the years 1929-1933 are: $83,294,677, $83,294,688, $82,999,997, $78,850,024 and $78,832,888. The trial judge found no overassessment for 1932 but refused to find the value of the property in 1933 or whether the assessment for that year was excessive; and he found that there is no evidence, other than that offered to show overvaluation, that the assessment was fraudulent or made with intent to defraud petitioner. The Circuit Court of Appeals held that petitioner failed to prove the method employed by the board to make the assessment or that it was grossly excessive and arbitrary.

Respondents' witness prepared tabulations which were put in evidence as Exhibit P. It shows: 1. The value for each year, based on averages for preceding five years, from 1929 to 1933, inclusive, of the system operating property as indicated by: (a) stock and bond value less value of non-operating property; (b) net operating income capitalized at six per cent; (c) the average of (a) and (b). 2. Apportionment of system value to North Dakota by percentages reflected by average of: (a) three use factors, i. e. transportation service, traffic units and gross operating revenue; (b) mileage of tracks operated and the three use factors; (c) mileage of tracks owned and operated and leased and operated and the three use factors; (d) mileage of track operated, physical property and the three use factors; (e) mileage of track operated, physical property, the three use factors and net revenue. 3. Apportionment to North Dakota of: (a) stock and bond value; (b) capitalized value; (c) average of (a) and (b). 4. The North Dakota assessments. Ratio of assessments to apportionments made

on (a) stock and bond value; (b) capitalized value; (c) average of (a) and (b).[2]

The composite of the five year average of stock and bond value and of net operating income capitalized for 1932 was $415,278,961;

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[2] Exhibit P need not be given in full. The following statement shows by years, 1929-1933 inclusive:

Column 1, system value according to average of stock and bond value and capitalized value.

Column 2, percentage of system value in North Dakota as reflected by the apportionment factors used in the exhibit.

Column 3, values apportioned to North Dakota according to average of stock and bond values and capitalized values.

Column 4, the North Dakota assessments.

Column 5, ratio of assessments to assigned values on the basis of stock and bond values.

Column 6, ratio of assessments to assigned values on the basis of capitalized values.

Column 7, ratio of assessments to assigned values on the basis of composite of both.

	1	2	3	4	5	6	7
Apportionment to North Dakota on basis of three use factors, i. e., transportation service, traffic units and gross operating revenue.							
1929..	$437,789,980	18.826%	$82,418,342	$83,294,677	112.09%	92.01%	101.06%
1930..	460,989,128	18.80	86,665,956	83,294,688	107.12	87.15	96.11
1931..	455,777,674	18.853	85,927,765	82,999,997	103.73	90.37	96.59
1932..	415,278,961	19.00	78,903,003	78,850,024	102.36	97.62	99.93
1933..	345,188,820	19.14	66,069,140	78,832,888	114.95	124.03	119.32
Apportionment to North Dakota on basis of trackage operated and the three use factors.							
1929..	437,789,980	19.113	83,674,799	83,294,677	110.40	90.63	99.55
1930..	460,989,128	19.148	88,270,198	83,294,688	105.17	85.57	94.36
1931..	455,777,674	19.185	87,440,947	82,999,997	101.94	88.81	94.92
1932..	415,278,961	19.298	80,140,534	78,850,024	100.78	96.11	98.39
1933..	345,188,820	19.345	66,776,777	78,832,888	113.73	122.71	118.05
Apportionment to North Dakota on basis of mileage of tracks owned and operated and leased and operated and the three use factors.							
1929..	437,789,980	19.59	85,763,057	83,294,677	107.72	88.42	97.12
1930..	460,989,128	19.632	90,501,386	83,294,688	102.58	83.46	92.04
1931..	455,777,674	19.673	89,665,142	82,999,997	99.41	86.60	92.57
1932..	415,278,961	19.775	82,121,415	78,850,024	98.35	93.79	96.02
1933..	345,188,820	19.812	68,388,809	78,832,888	111.05	119.82	115.27
Apportionment to North Dakota on basis of trackage operated, physical property and the three use factors.							
1929..	437,789,980	18.05	79,021,091	83,294,677	116.91	95.97	105.41
1930..	460,989,128	18.102	83,448,252	83,294,688	111.25	90.51	99.82
1931..	455,777,674	18.136	82,659,839	82,999,997	107.84	93.94	100.41
1932..	415,278,961	18.206	75,605,688	78,850,024	106.82	101.88	104.29
1933..	345,188,820	18.34	63,307,629	78,832,888	119.97	129.44	124.52
Apportionment to North Dakota on basis of trackage operated, physical property, the three use factors and net revenue.							
1929..	437,789,980	18.783	82,230,092	83,294,677	112.34	92.22	101.29
1930..	460,989,128	18.773	86,541,489	83,294,688	107.27	87.28	96.25
1931..	455,777,674	18.710	85,276,003	82,999,997	104.53	91.06	97.33
1932..	415,278,961	18.725	77,760,985	78,850,024	103.86	99.05	101.40
1933..	345,188,820	18.763	64,767,778	78,832,888	117.26	126.52	121.72

admittedly that was produced by the use of the two methods shown by respondents' witness to be universally approved as the best methods for finding system value. The 1932 assessment is 99.93% of that figure apportioned on the basis of the three use factors, 98.39% apportioned on the basis of track mileage operated and three use factors; 96.02% apportioned on tracks owned and operated and leased and operated and the three use factors, 104.29% apportioned on track mileage, physical property and the three use factors; 101.40% apportioned on track operated, physical property, three use factors and net revenue.

If the system value for 1933 had been computed on the basis of the stock and bond and capitalized income methods used for 1932, it would have been $345,188,820, about 83% of the corresponding figure for 1932, less than 76% of like figures for 1931 and 1930 and about 79% of that for 1929. See footnote 2. The 1933 assessment exceeds what would have been made on system valuation based on the five-year average of stock and bond values, apportioned by use of the five factors above described (advocated by the State as "the fairest basis of allocation") by 19.97%, exceeds that based on net operating income capitalized by 29.44%, on the composite of both by 24.52%. The testimony and computations made by respondents' witness show that the 1933 assessment could not have been arrived at by any calculation based on the principles and methods governing the tax commissioner in his computations submitted to the board through a period of years and constituting the controlling bases of the assessments made by it. The five-year average of the composite of the stock and bond and capitalized income values, held by all to be the best method, produced for 1932 a valuation within one-sixth of one per cent. of the assessment for that year. The board arbitrarily adopted that assessment, less value of a short stretch of track removed, as the assessment for 1933. If the assessment for that year had been based on the principles governing in 1932 and preceding years, it would have been less by about $13,000,000 than the amount fixed by the board and here in controversy.

The long period through which, even in 1933, the depression had extended compelled the conclusion that it was not temporary. Judicial notice must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities, and that the depression then commenced progressively became greater. In making

assessments in that period, the board was bound to take into account and give due weight to the sudden, progressive and enormous declines of value.

Respondents' witness testified: The purchasing power of money greatly increased and correspondingly values decreased from 1929 to 1933. The Dow-Jones & Company average of 30 industrial stocks fell from 383.17 in September, 1929, to 41.22 in July, 1932. The average of 20 railroad stocks fell between the same dates from 189.11 to 13.23; total market value of all common and preferred stocks listed on the New York Stock Exchange fell from eighty-nine and one-half billion to fifteen and one-half billion dollars. Assessing officials and equalizing boards were confronted with a very difficult situation. "Values which had been more or less stable for a generation have melted rapidly away. If all assessments had been reduced to conform to actual market value, the State and its subdivisions would have ceased to function, as the revenue would not even approximate necessary expenses".

Changed business conditions affecting petitioner's traffic coupled with competition from new methods of transportation precluded belief that prospective improvement in petitioner's business and earnings would within a reasonable time, if ever, be sufficient to justify the assessment in question. Cf. *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 423. But from 1929 to and including 1933 the board reduced assessments of petitioner's North Dakota railroad properties by less than six per cent. It is everywhere known that the general decline in values in that period was very much greater than that. The evidence conclusively shows that the value of petitioner's system and of its North Dakota railroad properties declined several times six per cent. Its traffic, gross earnings and net income from operation fell off enormously.[3] The 1929

[3]

Year	Railway Operating Revenue	Net Railway Operating Income
1922	$103,452,937	$17,276,598
1923	120,077,771	24,731,992
1924	110,243,104	24,201,287
1925	114,924,960	28,276,183
1926	117,383,909	31,280,429
1927	117,904,005	29,202,540
1928	126,737,091	31,294,069
1929	125,932,808	32,457,523
1930	104,996,076	21,912,508
1931	77,087,454	12,669,420
1932	55,549,247	1,290,551

collapse and the decline progressively following it resulted in much lower levels of prices and values which at least as early as 1933 were to be regarded not as temporary but as at least relatively permanent. *Atchison etc. Ry. Co.* v. *U. S.*, 284 U. S. 248, 260-261. *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U. S. 287, 311-312.

In cases such as this, courts are not permitted to weigh evidence of value. They may not substitute their opinions for the findings of assessing officers or boards. But, when the jurisdiction of the district court is appropriately invoked, it is its duty to decide upon the merits of the taxpayer's claim that the assessment of his property was arbitrarily made and is grossly excessive. It clearly appears that the board failed to give reasonable weight to the falling off of petitioner's traffic, gross earnings, operating income, the extraordinary shrinkage in values of railroad properties, the prices of commodities and securities generally. The value of petitioner's property varied with the profitableness of its use, present and prospective. *Cleveland, &c. Railway Co.* v. *Backus*, 154 U. S. 439, 445. *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76, 81-82. Petitioner's system net operating income was for 1929 in round figures $32,457,000; in the following years $21,912,000, $12,669,000, $1,290,000. The board persistently disregarded known conditions essential to the just ascertainment of value. While the vanishing of values described by respondents' witness, the reduction of the tax base from 75% to 50%, and the established limitations upon rates of taxation justify diligence on the part of the assessing authorities that taxable property be assessed at full value, neither these nor any other conditions warrant or excuse arbitrary or excessive valuations.

The facts alleged in respondents' answer and those shown by the testimony of their witness and his computations above described compel the conclusion that, by reason of changed conditions affecting value, the methods or system by which the board arrived at the 1933 value of petitioner's railway as a whole were plainly calculated to produce a grossly excessive assessment of its North Dakota property for that year. That assessment being shown to have been arbitrarily made and grossly excessive, petitioner's right to relief was not conditioned upon overassessment or upon its submission to overtaxation in 1932 or any prior year. It follows that the lower courts erred in holding that petitioner was not entitled to any relief. The evidence persuasively supports peti-

tioner's claim that by reason of system overvaluation the North Dakota assessment was too high by $15,000,000. And, resolving all doubts in favor of validity, the evidence must be held conclusively to show that the challenged assessment exceeds the true and full value of petitioner's North Dakota railroad properties in 1933 by $10,000,000. See footnote 2. The board's failure to consider the enormous diminution in value of petitioner's property caused by the 1929 collapse and the progress of the depression is, within the principles of our decisions, the equivalent in law of intention to make a grossly excessive assessment for 1933 in disregard of petitioner's rights under the due process clause of the Fourteenth Amendment. We need not consider whether the assessment is repugnant to the equal protection or commerce clause. Unquestionably, the assessment was made in plain violation of established principles that govern property valuation. *Fargo* v. *Hart*, 193 U. S. 490, 502. *Rowley* v. *Chicago & N. W. Ry., supra*, 109-110. *S. W. Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S 276, 287-288 *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 692. *McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 408-412. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

The judgment of the Circuit Court of Appeals will be reversed. The case will be remanded to the district court with directions to enter a decree for petitioner, the plaintiff below, that respondents, the defendants below, be enjoined from collecting on account of the taxes levied against petitioner on the basis or because of the challenged assessment any amount in excess of such proportion of the taxes levied as the value above indicated; $68,832,888, is to the assessment, $78,832,888, being 87.3149+%; the injunction will be conditioned upon payment by petitioner of that proportion of the taxes. And the decree shall declare that it is without prejudice to the authority of the state board of equalization, if any it has, again to assess petitioner's properties for 1933.

It is so ordered.

SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1935.

Great Northern Railway Company, Petitioner, *vs.* J. J. Weeks, State Tax Commissioner, et al., etc. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 3, 1936.]

Mr. Justice Stone.

I think the judgment should be affirmed.

The decision of the Court turns on the constitutionality of the valuation, for 1933 taxation, of so much of petitioner's railroad as is located in North Dakota.

The Court finds that the valuation of the railroad within the state is not so disproportionate to the value of petitioner's entire railroad system as to transcend due process. See *Fargo* v. *Hart*, 193 U. S. 490, 500; compare *Rowley* v. *Chicago & Northwestern Ry.*, 293 U. S. 102, 109-111. It does not find, and there is no contention, that there has been any discrimination in the valuation of petitioner's property as compared with that of other property in the state. Its decision that the tax is invalid rests on the single ground that the valuation is excessive.

This conclusion is based on an elaborate examination of the evidence produced before the trial court, evidence which it is assumed affords the only basis for the valuation of the Board of Equalization. Emphasizing as the important, if not controlling factors, in determining taxable value, the depressed market value of the securities of the entire railroad, representing its property in many states, its diminished earnings, its capitalized value based on what it considers, for this purpose, a fair rate of return, the Court concludes that, as prices of securities and earnings were much lower in 1933 than in 1932 and earlier years, the valuation of the railroad property in North Dakota for that year should have been correspondingly reduced. And because the decline in value found by this formula is substantial, something like 20%, and as the

Board placed the same valuation on the property in 1933 as in 1932, it is declared that the valuation is so arbitrary as to make any tax based upon it a violation of due process.

We may lay aside any consideration of the numerous uncertain and imponderable elements involved in valuation of a railroad which may well make the use of such a formula untrustworthy in times like the present, see *Rowley* v. *Chicago & Northwestern Ry.*, *supra*, 109; which would seem to make it impossible for a court to say that the rejection of the results of such a formula by the taxing officials involved anything more than the exercise of an authorized judgment, which courts cannot pronounce arbitrary merely because it does not conform to their own.

The feature of the decision which is especially a matter of concern is that for the first time this Court is setting aside a tax as a violation of the Fourteenth Amendment on the ground that the assessment on which it is computed is too high, without any showing that the assessment is discriminatory or that petitioner is in any way bearing an undue share of the tax burden imposed on all property owners in the state.

Assessment for taxation is a quasi-judicial act and the tax assessment has the quality of a judgment. *Hagar* v. *Reclamation District*, 111 U. S. 701, 709; *Gallup* v. *Schmidt*, 183 U. S. 300; *Londoner* v. *Denver*, 210 U. S. 373, 386; *Turner* v. *Wade*, 254 U. S. 64. Even if the valuation of the Board be erroneous, the errors of a state judicial officer, however gross, whether of law or of fact, are not violations of the Constitution and are not open to review in the federal courts merely because they are errors. If overvaluation, even though gross or intentional, were, without more, held to infringe the Fourteenth Amendment, every taxpayer would be at liberty to ask the federal courts to review a state tax assessment upon the bare allegation that it is grossly excessive, and without showing that it does more than subject him to taxation on the same basis as every other taxpayer.

It has long been recognized that discrimination between taxpayers, if intentional or so persistent as to be systematic, is a denial of equal protection, whether the discrimination is in the application of different rates to property in the same class or in inequality in its valuation. *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 245; *Cumberland Coal Co.* v. *Board*, 284 U. S.

23, 25ff; *Chicago N. W. Ry. Co.* v. *Kendall*, 266 U. S. 94, 98, 99; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445; *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 37. But to hold that a tax is unconstitutional because based upon an assessment which is too high, as compared with the value of the same property for purposes of condemnation, overlooks the principle upon which property taxes are laid and collected. Taxation is but a method of raising revenue to defray the expenses of government, and of distributing the burden among those who must bear it. The taxpayer cannot complain of the tax burden which he has to bear, who shows no inequality in the application of it. And plainly he does not show inequality merely by proving that the valuation of his property for taxation is much higher than its market or its condemnation value.

The burden of a property tax like the present is distributed by applying a rate of tax to the assessed valuation of all taxable property. Variation of either, without discrimination, affects the amount of the tax but not the equality of its distribution. The activities and expenses of government, over which the state has plenary control, do not cease in time of depression. They may increase. The state may meet those expenses by raising the valuation of taxable property, or by raising tax rates, or both, without infringing any constitutional immunity. Here the state, so far as appears, is raising the needed revenue and distributing the burden as in previous years, by continuing old valuations. However high those valuations may be, if not discriminatory, they impose no unequal share of the tax burden on petitioner and cannot be said to be arbitrary or oppressive in the constitutional sense.

Recently we held that a claim that the rate of a non-discriminatory tax is excessively high presents no constitutional question. *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44. No reason has been advanced at the bar, or given in the opinion of the Court, why a tax valuation, excessive when compared with condemnation or market value, should have any different legal consequences. In neither case is inequality of the tax burden established. It is for that reason that this Court has held, without exception, that valuation of property for tax purposes, however excessive, not shown to be discriminatory, infringes no constitutional immunity. *Rowley* v. *Chicago & N. W. Ry.*, *supra*, 111; *Southern Ry. Co.* v. *Watts*,

260 U. S. 519, 526; and see *Cumberland Coal Co.* v. *Board*, 284 U. S. 23, 25ff, *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350.

Cases setting aside an excessive allocation of railroad system value to the taxing state, *Fargo* v. *Hart, supra; Rowley* v. *Chicago & Northwestern Ry., supra,* or setting aside improper valuation made for purposes of condemning property, *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, or for determining whether public utility rates are confiscatory, *Southwestern Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 287, 288; *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 692; *McCardle* v. *Industrial Co.*, 272 U. S. 400, 408, 412, do not support the decision now made. In such cases the complainant, because the valuation is too high or too low, suffers a harm from which the Constitution guarantees immunity. But the Constitution guarantees no immunity from taxation even though the tax, because of its amount, may be burdensome, see *Magnano Co.* v. *Hamilton, supra,* or because it is as high in a year of depression and falling property values as in years of prosperity. Beyond this petitioner does not show that it is harmed, or present any case for invoking the protection of the Constitution.

Mr. Justice BRANDEIS and Mr. Justice CARDOZO join in this opinion.